# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 366/102

WILLIAM J. DeTREVILLE, PLAINTIFF IN ERROR,

vs.

ROBERT SMALLS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED MARCH 28, 1876.

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1 No. 1.

THE UNITED STATES OF AMERICA,
*District of South Carolina, to wit:*

At a circuit court of the United States for the fourth circuit, in and for the district of South Carolina, begun and holden at Charleston, in the district aforesaid, on the first Monday in April, 1875, before the honorable Morrison R. Waite, Chief Justice, and the honorable Hugh L. Bond, associate justice of the said United States, holding said circuit court according to the form of the act of Congress in such case made and provided, the following proceedings were had:

WILLIAM J. DE'TREVILLE }
*vs.*
ROBERT SMALLS. }

Be it remembered that heretofore, to wit, the fourth Monday in November, in the year of our Lord one thousand eight hundred and sixty-nine, the said William J. De'Treville impleaded the said Robert Smalls in a declaration in trespass, as follows:

2 No. 2.

*Writ.*

The State of South Carolina to all and singular the sheriffs of the said State, greeting:

You and each of you are hereby commanded, without delay, to attach the body of Robert Smalls, defendant, wheresoever he may be found within your and each of your respective counties, so that you compel him to be and appear before the justices of the said State, at the court of common pleas, to be holden at Beaufort, for the county of Beaufort, on the third Monday in April next, to answer to William J. De'Treville, plaintiff, in a plea of trespass, wherefore, with force and arms he, the said Robert Smalls, broke and entered the close of him, the said William J. De'Treville, in the town and county of Beaufort and State aforesaid, and the fences in said close did pull and break down, and did break, cut down, dig up, and destroy the timber, trees, grass, and earth of him, the said W. J. De'Treville, within the said close then growing, and being of great value, and other wrongs and enormities the' and
3 there did, against the peace and dignity of the said State, to the damage of the said plaintiff fifteen thousand dollars; and have you this writ before the clerk of said court, at Beaufort, fifteen days next before the sitting thereof.

Witness, H. G. Judd, esquire, clerk of the said court at Beaufort, the fourth day of March, in the year of our Lord one thousand eight hundred and sixty-nine, and in the ninety-third year of the sovereignty and Independence of the United States of America.

[SEAL.] RICH'D DE'TREVILLE,
*Plaintiff's Attorney.*

H. G. JUDD, *C. C. P.*

No. 3.

*Endorsements.*

Ent'd 16 M'ch, 1869. A. Williams, S. B. C.

This action is brought as well to try the titles as for damages.

RIC'D DE'TREVILLE,
*Pl'ff's Att'y.*

No. 4.

*Service of writ.*

In my own proper person I did serve defendant with a copy of this writ by leaving copy at defendant's residence.

ALFRED WILLIAMS,
*Sheriff Beaufort Co.*

4 SHERIFF OFFICE,
*Beaufort, S. C., Mar. 16th,* 1869.

Service proved.

H. G. JUDD,
*C. C. P. & G. S.*

No. 5.

*Declaration.*

THE STATE OF SOUTH CAROLINA,
*County of Beaufort, to wit:*

In common pleas.

Robert Smalls, the defendant, was attached to answer to William J. De'Treville, plaintiff, in a plea wherefore with force and arms he, the said Robert Smalls, broke and entered the close of him, the said William J. De'Treville, in the town and county of Beaufort and State aforesaid, and the fences in said close did pull and break down, and did break, cut down, dig up, and destroy the timber, trees, grass, and earth of him, the said W. J. De'Treville, then growing and being of great value, and other wrongs and enormities then and there did against the peace and dignity of the said State, and to the plaintiff's damage fifteen thousand dollars.

And thereupon the plaintiff, by Richard De'Treville, his attor-
5 ney, complains for that the said Robert Smalls on the day of , in the year of our Lord one thousand eight hundred and sixty-four, and on divers other days and times between that day and the commencement of this suit, with force and arms broke and entered a certain close of the said plaintiff, situate in the town of Beaufort, in the county of Beaufort, and in the said State, known & distinguished on the old plat of the said town as lots Nos. 104 & 388, abutting to the north on lot formerly known as lot number 387; on the south by the street formerly known as Prince street, now F street; on the east by vacant lots designated as "lot A of block 23," formerly lots 26 & 27, and on the west by the streets formerly known as New street,

now known as 5th street, the said close being now designated in the plat of the said town recently made as lot B, block 23, and measuring northwardly & southwardly each eighty-three feet, and eastwardly & westwardly each one hundred & twenty feet, and then and there forced & broke open divers gates of the plaintiff in the said close, being of great value, to wit, of the value of six thousand dollars; and did pull down, remove, and destroy divers, to wit, four fences of the plaintiff within the said close, being of great value, to wit, of the value of one thous-
6 and dollars; and did pull down and remove divers, to wit, four houses of the said plaintiff within the said close, being of great value, to wit, of the value of two thousand dollars; and did break and enter into a certain dwelling-house in the said close, being of the plaintiff, and did break and destroy certain doors and windows thereof, and the locks, hinges, and staples thereon of the said plaintiff, being of great value, to wit, of the value of five thousand dollars; and with feet in walking trod down the grass and earth of the said plaintiff within the said close, being of great value, to wit, of the value of one thousand dollars; and did dig up and destroy the trees of said plaintiff in said close, being of great value, to wit, of the value of one thousand dollars; and other wrongs and enormities to the said plaintiff then and there did to the great damage of the plaintiff and against the peace and dignity of the State aforesaid.

Wherefore the said plaintiff saith he is injured and hath sustained damage to the amount of fifteen thousand dollars, and therefore he brings his suit & so forth.

RICHARD DE'TREVILLE,
*Plaintiff's Attorney.*

7 August term, A. D. 1869. In the common pleas.

ROBERT SMALLS
*ads.*
WILLIAM J. DE'TREVILLE.

And the said defendant, by William J. Whipper, his attorney, comes and defends the force and injury when, and so forth, and says that he is not guilty of the said supposed trespass within laid to his charge, or any or either of them or any part thereof, in manner and form as the said plaintiff have within thereof complained against him; and of this he, the said defendant, put himself upon the country, and so forth.

WHIPPER, ELLIOTT & ALLEN,
*Def't's Att'y.*

And the said plaintiff, by his attorney, doth the like.

RICH'D DE'TREVILLE,
*Pl'ff's Att'y.*

No. 6.

*Endorsement.*

This action is brought as well to try the title as for damages.

RICH'D DE'TREVILLE,
*Pl'ff's Att'y.*

And on the day of 187 , came into court the plaintiff,
8 W. J. De'Treville, by his attorney, R. De'Treville, and filed the following notice & affidavit; which notice & affidavit is in the words and tenor following:

No. 7.

*Notice & affidavit.*

STATE OF SOUTH CAROLINA,
*Beaufort County:*

WILLIAM J. DE'TREVILLE
*vs.*
ROBERT SMALLS. } Complaint, trespass to try titles.

Before me personally appeared W. J. De'Treville, who, being sworn, says that the majority of jurors who are drawn for the county of Beaufort and a majority of those residing in said county are in possession of real estate which they hold and claim under titles identical in character, nature, strength, and efficacy with those under which the defendant in this action claims a right to the possession of the real estate for which the plaintiff brings suit, so that their own titles will be necessarily affected by the result of this trial. And the plaintiff, for this cause and for other causes, believes that a fair and impartial trial of the said case cannot be had in the county of Beaufort.

9 Plaintiff further states that his residence is in Orangeburg, and the convenience of deponent & others as witnesses & the ends of justice will be promoted by changing place of trial.

And plaintiff desires that the trial of said case be removed to the county of Charleston.

Sworn before me this 4th day of February, 1873.

W. J. DE'TREVILLE.

T. H. COOKE,
*Trial Justice.*

To ROBERT SMALLS:

You will take notice that the plaintiff will move before his honor Judge Q. Platt, on Monday, the twenty-seventh day of February, A. D. 1871, or the most convenient day thereafter, for an order changing place of trial of this cause from Beaufort County to Charleston County, and transferring all proceedings therein to said county of Charleston.

RICH'D DE'TREVILLE,
*Pl'ff's Att'y.*

No. 8.

*Service.*

STATE OF SOUTH CAROLINA,
*Richland County:*

10 A. Boyd Sheddon, being duly sworn, says that he served the within order and affidavit *and* the defendant, Robert Smalls, personally, by delivering to him and leaving with him a copy of the same at Columbia, on the sixteenth day of February, A. D. 1871.

A. BOYD SHEDDAN.

Sworn to before me this 16th day of February, 1871.

P. F. FRAZEE,
*Notary Public.*

And on the 3rd day of February, A. D. 1873, came into court the defendant, Robert Smalls, and filed the following petition; which petition is in the words and tenor following:

No. 9.

*Petition.*

UNITED STATES OF AMERICA,
*District of South Carolina:*

In the circuit court, fourth circuit.

To the judges of the circuit court of the United States of America for the district of South Carolina, in the fourth circuit:

The petition of Robert Smalls respectfully shows that your
11 petitioner was, prior to the commencement of the suit hereinafter referred to, a purchaser from the United States, and as such occupied certain lands and tenements purchased from the United States, situate in the county of Beaufort and State of South Carolina, and that on or about the day of April, A. D. 1869, a suit was commenced against your petitioner by William J. De'Treville, in the court of common pleas for Beaufort County, in the State of South Carolina, for or on account of the title to the lands and tenements aforesaid, set up or claimed by your petitioner under the revenue laws of the United States, and that he has been served with process in said suit in said county of Beaufort, in said district of South Carolina, and no trial has been had in said cause.

Your petitioner therefore prays that, in pursuance of the act of Congress in such case made and provided, that said cause so commenced in the said court of common pleas may be removed therefrom and entered on the docket of this honorable court, and thereafter proceeded in as a cause originally commenced in this court.

And your petitioner will ever pray, &c.

ROBERT SMALLS.

No. 10.

12 DISTRICT OF SOUTH CAROLINA,
*Charleston County:*

Robert Smalls, the above-named petitioner, being duly sworn, deposes and says the matters set forth in the foregoing petition are true to the best of his knowledge, information, and belief.

ROBERT SMALLS.

Sworn to before me this 3rd day of February, A. D. 1873.

JNO. F. PORTEOUS,
*U. S. Com'r.*

And on the 3rd day of February, A. D. 1873, came into court the defendant, by his attorney, D. T. Corbin, and obtained the following order, which order is in the words and tenor following:

No. 11.

*Order.*

On motion of D. T. Corbin, esqr., U. S. att'y, ordered, that a writ of certiorari be issued for the transfer of the record in the said cause.
3rd Feb'y, 1873.

GEO. S. BRYAN,
*U. S. Judge Dist. of So. C'a.*

13 And on the 13th day of March, A. D. 1873, came into court W. J. Whipper, and filed the following certificate, which affidavit is in the words and tenor following:

No. 12.

*Certificate.*

I, W. J. Whipper, certify, as counsel for the petitioner, I have examined into the proceedings against him, and have carefully inquired into all the matters set forth in the within petition, and I believe the same to be true.
Beaufort County, S. C., M'ch 13th, 1873.

W. J. WHIPPER,
*Att'y at Law, Counsellor of the said Court of Common Pleas for Beaufort County.*

And on the 30th day of February, A. D. 1875, came into court the defendant, Robert Smalls, by his attorney, D. T. Corbin, and obtained the following certiorari, which certiorari is in the words and tenor following:

No. 13.

*Certiorari.*

14 The President of the United States of America to the judge of the court of common pleas for the county of Beaufort, South Carolina, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the district of South Carolina, in the fourth circuit, shall be certified of a certain cause commenced before you against Robert Smalls, defendant, by William J. De'Treville, plaintiff, do therefore command you, that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of Charleston, on the first Monday of April, A. D. 1873, as fully and amply as the same are remaining before you, by whatsoever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.
Witness Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, the 30th day of Feb., A. D. 1873.
[SEAL.]

DAN'L HORLBECK,
*C. C. C. U. S. for S. C.*

D. T. CORBIN,
*Defendant's Attorney, U. S. Attorney.*

15 No. 14.

*Endorsements.*

R. DE'TREVILLE, Esq.:

SIR: Take notice that the within is a copy of a certiorari issued out of the circuit court of the United States for the district of South Carolina.

Charleston, S. C., Feb. 25, 1873.

D. T. CORBIN,
*Defendant's Attorney, U. S. Attorney for S. C.*

Due service of a copy of the within and of the above notice is hereby admitted.

*Plaintiff's Attorney.*

No. 15.

*Return of marshal.*

On the 6th day of Feb'y, 1873, I served on the within-named H. G. Judd a copy of the within writ by leaving the same with him.

GEO. HOLMES,
*Dep'ty U. S. M.*

And on the 11th day of May, A. D. 1875, came into court the
16 plaintiff, W. J. De'Treville, by Simonton & Barker, and obtained the following order of substitution of attorneys, which order is in the words and tenor following:

No. 16.

*Order of substitution of attorney.*

THE UNITED STATES OF AMERICA,
*District of South Carolina:*

WILLIAM J. DE'TREVILLE
*vs.*
ROBERT SMALLS.

R. De'Treville, esq., the attorney on the record, having departed this life, on motion of the plaintiff, Simonton & Barker are substituted as attorneys on the record.

May 11, 1875.

M. R. WAITE,
*Chief Justice, &c.*

No. 17.

*Recital of continuances.*

And on the first Monday in April, in the year of our Lord one thousand eight hundred and seventy-three, came again into court the
17 parties aforesaid, by their attorneys aforesaid, and upon motion of the said Robert De'Treville, by his attorneys, and by and with

the consent of the said Robert Smalls, by his attorney, further process of and upon the premises aforesaid is by order of the court continued until the fourth Monday in November next. At which said fourth Monday in November, in the year of our Lord one thousand eight hundred and seventy-three, come again into court the said parties, and the said cause is likewise continued until the first Monday in April, 1874, and by like order the same is then continued until the fourth Monday in November, 1874, and thence by like order continued until the first Monday in April, 1875; at which said Monday in April, 1875, come into court the parties aforesaid by their attorneys.

17*a* And on the 1st of May, A. D. 1875, came into court the attorneys in the cause, and filed the following agreement as to pleadings & proof, which agreement is in the words and tenor following:

*Agreement as to pleadings & proof.*

UNITED STATES OF AMERICA,
*District of South Carolina:*

W. J. DE'TREVILLE
*vs.*
ROBERT SMALLS.

It is hereby agreed by and between the attorneys for the plaintiff and defendant in this action that on the trial of the same the defendant will not require the plaintiff to prove his chain of title from the grant, but only what would be a good paper title at the time of trial in himself to the premises in controversy, provided the defendant's title were not set up in opposition thereto.

It is further agreed that the defendant, under the plea, the general issue made herein, may prove his title to the premises without pleading the same specially, his title being derived through the following
17*b* mesne conveyances, viz: 1. Cash-sale land-certificate No. 2; 2. Tax-sale certificate No. 238, a copy of each of which are hereto attached, marked Exhibits A and B, respectively.

It is further agreed that the regulations for the collection of direct taxes embodied in a compilation of the direct-tax laws of the United States, printed at the Government Printing Office, Washington, in the year 1874, may be given in evidence without other proof of their authenticity.

April 30, 1875.

D. T. CORBIN,
*U. S. Att'y for Def't.*
SIMONTON & BARKER,
*Pl'ff's Att'ys.*

EXHIBIT A.

*Cash-sale land-certificate No. 2.*

This certifies that at a sale of lands under and by virtue of the provisions of the eleventh section of an act entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," approved June 7, 1862, and under and by virtue of the direction and instructions of the President of the
17*c* United States, issued in pursuance of the same, under date of

September 16, 1863, held pursuant to due notice at Beaufort, in the parish of S't Helena, in the district of Beaufort, in the State of South Carolina, on the twentieth day of January, in the year of our Lord one thousand eight hundred and sixty-four, the tract or parcel of land hereinafter named, situate in the town of Beaufort, in the district of Beaufort, in the State aforesaid, and described as follows, to wit:

All of lot B, in block twenty-three (23), according to the plat recorded in the office of the U. S. direct-tax commissioners for the district of South Carolina, was sold and struck off to Robert Small for the sum of six hundred and sixty-five dollars, he being a loyal citizen of the United States and the highest bidder for the same, and that being the highest sum bidden for the same, the receipt whereof is hereby acknowledged and confessed. This certificate is given subject to all the provisions of said act, and of the act amendatory of the same, approved February 6, 1863.

Given under our hands at Beaufort, in the parish of S't Helena,
17*d* in the district of Beaufort, in the State aforesaid, this second day of February, A. D. 1864.

A. D. SMITH,
W. E. WORDING,
W'M HENRY BRISBANE,
*United States Direct-tax Commissioners for the District of South Carolina.*

EXHIBIT B.

UNITED STATES OF AMERICA:

*Tax-sale certificate No.* 238.

This is to certify that at a sale of lands for unpaid taxes under and by virtue of an act entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," held pursuant to notice at Beaufort, in the district of Beaufort, in the State of South Carolina, on the 13th day of March, A. D. 1863, the tract or parcel of land hereinafter described, situate in the town of Beaufort, and State aforesaid, and described as follows, to wit:

Lot B, in block 23, according to the commissioners' plat, was
17*e* sold and struck off to the United States for the sum of fifteen dollars and cents, being the highest bidder, and that being the highest sum bidden for the same, the receipt of which said sum in full is hereby acknowledged and confessed.

Given under our hands at Beaufort this 2nd day of April, A. D. 1863.

WILLIAM E. WORDING,
W'M HENRY BRISBANE,
*Commissioners.*

No. 18.

Wherefore it is commanded, that the marshal of the said district do summon forty-eight good and lawful men, to be drawn by ballot according to the directions of the act of Congress in such case made and provided, to be and appear before the justices of the said court, to be
18 holden at Charleston, on the first Monday of April next, by whom, and so forth, and who neither, and so forth, to recognize, and so forth, because as well, and so forth, and the same day given to the parties aforesaid, at the place aforesaid.

And afterwards, that is to say on the day and at the place aforesaid, before the justices aforesaid, come as well the said Robert Smalls, by his attorneys aforesaid, as the said William J. De'Treville, by his attorneys aforesaid, and the jurors aforesaid being demanded, some of them, to wit, James Cosgrove, foreman, and eleven others, come, and being drawn by ballot, according to the directions of the said act of Congress aforesaid, and sworn of the jury aforesaid, to say the truth of the within contained, do on their oath say that the said defendant did not break and enter the close of said plaintiff, &c., as the said William J. De'-Treville, plaintiff, has alleged.

Wherefore, it is considered that the said Robert Smalls, defendant, do recover against the said William J. De'Treville the sum of dollars for costs and charges aforesaid, to the said defendant by the said
19 court, now herewith, assent, adjudged, which said costs amount in the whole to dollars, aforesaid mentioned as .

And be the said plaintiff in mercy, and so forth.

D. T. CORBIN,
*U. S. Attorney, for Defendant.*

No. 19.

*Memorandum.*

Before the jurors withdrew from the bar of the court here the said William J. De'Treville, by his attorneys aforesaid, tendered to the court here the following bill of exceptions, which was by the court here signed and sealed, which is in form following, to wit:

*Plaintiff's bill of exceptions.*

20 No. 20.

In the circuit court of the United States for the district of South Carolina.

WILLIAM J. DE'TREVILLE
*vs.*
ROBERT SMALLS. } April term, 1875.

At the trial of the cause, the plaintiff, to maintain and prove the issue on his part, gave in evidence his title to the close referred to in the declaration, viz:

A certain close of the said plaintiff, situate in the town of Beaufort, in the county of Beaufort, and in the said State (of South Carolina), known and designated on the old plat of the said town as lots Nos. 104 and 388, abutting to the north on lot formerly known as lot number 387, on the south by the street formerly known as Prince street, now F street; on the east by vacant lots designated as "lot A of block 23," formerly lots 26 and 27, and on the west by the street formerly known as "New street," now known as 5th street; the said close being now designated in the plat of the said town recently made as "lot B, block 23," and measuring northwardly and southwardly each eighty-three feet, and east-
21 wardly and westwardly each one hundred and twenty feet.

Plaintiff also proved the ejectment by entry of the defendant.

And the defendant, to maintain and prove the issue on his part, gave

in evidence a paper signed by William E. Wording and W'm Henry Brisbane, commissioners, which is as follows:

UNITED STATES OF AMERICA:

*Tax-sale certificate No.* 238.

This is to certify that at a sale of lands for unpaid taxes, under and by virtue of an act entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," held, pursuant to notice, at Beaufort, in district of Beaufort, in the State of South Carolina, on the 13th day of March, A. D. 1863, the tract or parcel of land hereinafter described, situate in the town of Beaufort and State aforesaid, and described as follows, to wit:

"Lot B, in block 23, according to the commissioners' plat," was sold and struck off to the United States for the sum of fifteen dollars and cents, being the highest bidder, and that being the highest sum bidden for the same; the receipt of which said sum in full is hereby acknowledged and confessed.

22 Given under our hands at Beaufort this 2d day of April, A. D. 1863.

WILLIAM E. WORDING,
W'M HENRY BRISBANE,
*Commissioners.*

To the introduction of which paper plaintiff objected on the following grounds, to wit:

First. That said paper is not in law a certificate, in this, that said paper does not, upon its face, show that those proceedings have been taken by the said commissioners prior to the alleged sale, which are essential to the regularity and validity thereof, and of which the act of Congress makes a purchaser's certificate prima facie evidence.

Second. That said paper is not a proper and legal certificate under the act of Congress, because on the face it shows that the commissioners have not sold the plaintiff's lot of land according to the enumeration of said lot required by the act.

Third. That section 13 of act of June 7, 1862, which in case of concealment or loss of the records of assessments and valuation of the respective lots of land to be assessed, authorizes the commissioners to value and assess the same in their own judgment, does not include

23 the right to make a new and different enumeration and description of the several lots and parcels of land.

Fourth. That said certificate was not issued to any person, at said sale, bidding "the sum of the taxes, penalty, and costs, and ten per centum per annum interest on said tax pursuant to "the notice required by the act, nor to any person bidding "a larger sum"; who, upon paying the purchase-money in gold and silver coin, or in the Treasury notes of the United States, or in certificates of indebtedness against the United States, "became entitled" under the act "to receive from the commissioners their certificate of sale," and that said certificate on its face purports not to have been issued by the commissioners to any "purchaser or purchasers," at a sale made under the seventh section of the act, and is not a purchaser's certificate of sale under the act, but a mere memorandum that the land was struck off to the United States, and as such memorandum is not made evidence by the act, and is not competent evidence in law of the facts which it recites.

24 The court overruled the objections and admitted the certificate, to which ruling the plaintiff excepted.

The plaintiff, in reply to the evidence of the said defendant, and to rebut the same, offered evidence to prove that the commissioners did not apportion and charge the said tax upon the said lot of ground owned by him as the same was enumerated and valued under the last assessment and valuation thereof made under the authority of the State of South Carolina, previous to the first day of January, 1861, but did apportion and charge the said tax upon a lot enumerated and designated as lot B, in block 23. Upon enquiry by the court, the plaintiff said that he did not expect to prove that the records of assessment and valuation of the lot as made under the authority of the State actually came within the possession of the board of commissioners previous to the making of their valuation and assessment as aforesaid.

To the introduction of this evidence the defendant objected, and his objection was sustained by the court.

The plaintiff thereupon excepted to this ruling of the court.

25 The plaintiff then offered evidence to prove that in the advertisement and notice of the sale of said lot, the same was not described as it was enumerated in the last valuation and assessment thereof made under the authority of the State previous to the first day of January, 1861, and that in said advertisement and notice the said lot was not described as the lot of said owner, nor by its situation and boundaries, nor as enumerated on the old plat of the town of Beaufort, nor by giving the streets and numbers thereon by which said lots were known and recognized, but by the enumeration and designation thereof as Lot B, in Block 23.

To the introduction of this evidence the defendant objected, and his objection was sustained by the court.

The plaintiff thereupon excepted to this ruling of the court.

The plaintiff then offered in evidence the following statement of W. E. Wording, one of the commissioners, to wit:

"That the sales under act of Congress, 1862, for non-payment of taxes were advertised by the commissioner to be made at Beaufort. On the Saturday preceding the sale, General Hunter, com-

26 manding the military district in which the lands advertised were situated, issued an order forbidding the sale. The commissioners, notwithstanding the order, proceeded to sell, and on the day fixed by the advertisement, and at the hour fixed therein, struck off one lot. They then adjourned the sales from day to day, meanwhile reporting the matter to General Hunter, who finally consented not to interfere with the sale, and to revoke his order, but who did not formally revoke it; and under these circumstances the sales actually took place some time in March following, about the 13 March, and after the first day of sale."

Plaintiff also offered evidence to prove that during that period Beaufort County was under martial law.

To the introduction of which evidence the defendant objected, and his objection was sustained by the court.

The plaintiff thereupon excepted to this ruling of the court.

And the testimony on both sides being closed, the plaintiff requested the court to instruct the jury in the following particular, viz:

27 "That the act of Congress approved 7 June, 1862, under which the defendant claims his title is in conflict with the 4th clause, 9th section, 1st article of the Constitution of the United States, in that the amount of the direct tax theretofore apportioned to the State of

South Carolina is increased by the addition thereto of a penalty of fifty per cent., and thus is not in proportion to the census or enumeration directed to be taken in the 3d section of the same article, whereby all direct taxes are to be apportioned among the several States."

But the court rejected each and every of the instructions prayed for by the plaintiff.

To the refusal of which instructions the plaintiff then and there, and before the jury had withdrawn from the bar, did except, and inasmuch as the matters aforesaid do not appear by the verdict of the jury, prayed the court here to sign and seal this his bill of exceptions, which is accordingly done this eleventh day of May, A. D. 1875.

[SEAL.] M. R. WAITE,
*Chief Justice, &c.*

28 And on the 15th day of May, A. D. 1875, came into court the plaintiff, William J. De'Treville, by his solicitors, Simonton & Barker, and obtained the following writ of error; which writ is in the words and tenor following:

No. 21.

*Writ of error.*

THE UNITED STATES OF AMERICA:

The President of the United States to the judge of the circuit court of the United States for the 4th circuit, sitting in South Carolina:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, between William J. De'Treville, plaintiff, and Robert Smalls, defendant, a manifest error hath happened to the great damage of
29 the said plaintiff as by his complaint appears: *He* being willing that error, if any there has been, should be duly corrected and final and speedy justice done to the parties aforesaid in this behalf, we do command you if judgment be therein given that then under *under* your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error *which* of right, and according to the laws and customs of the United States, should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the United States, the fifteenth day of May, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] J. E. HAGOOD,
*C. C. C. U. S., Dis't S. C.*

MAY 15TH, 1875.

30 And on the 15th day of May, A. D. 1875, came into court the plaintiff, by his solicitors, Simonton & Barker, and obtained the following citation; which citation is in the words and tenor following:

No. 22.

*Citation.*

THE UNITED STATES OF AMERICA:

To Robert Small, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of South Carolina, wherein William J. De'Treville is plaintiff, and you are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness my hand and seal at the city of Charleston, in the district aforesaid this fifteenth day of May, A. D. 1875.

M. R. WAITE,
*Chief Justice Sup. Ct U. S.*

Service accepted May 5, 1875.

D. T. CORBIN,
*U. S. Attorney.*

31 And on the 15th day of May, A. D. 1875, came into court the plaintiff, William J. De'Treville, and filed the following bond; which bond is in the words and tenor following:

No. 23.

*Bond.*

Know all men by these presents, that we, Charles H. Simonton, Theodore G. Barker, and D. B. Gilliland, are held and firmly bound unto Robert Small in the full and just sum of two hundred dollars, to be paid to the said Robert Small, his certain attorneys, executors, administrators, or assigns, to which payment, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this fifteenth day of March, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately, at a circuit court of the United States for the fourth circuit, in and for the district of South Carolina, in a suit pending in said court between William J. De'Treville, plaintiff, and Robert Small, defendant, judgment was rendered against the said plaintiff, and
32 the said plaintiff hath sued out a writ of error to the Supreme Court of the United States, and to reverse the judgment in the aforesaid suit, and hath filed a copy of said writ in the office of the clerk of the said circuit court, and a citation directed to the said Robert Small, citing and admonishing him to be and appear at a Supreme Court of the United States, to be held at the city of Washington on the second Monday in October next.

Now the condition of the above obligation is such, that if the said William J. De'Treville shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make his plea good,

then the above obligation to be void, or else to remain in full force and virtue.

D. B. GILLILAND. [SEAL.]
THEODORE G. BARKER. [SEAL.]
CHARLES H. SIMONTON. [SEAL.]

Sealed and delivered in the presence of—
G. D. BRYAN.

Approved by—

M. R. WAITE,
*Chief Justice Sup. C't U. S.*

33 No. 24.

UNITED STATES OF AMERICA,
*District of South Carolina:*

CLERK'S OFFICE, U. S. CIRCUIT COURT.

I, J. E. Hagood, clerk of said circuit court of the United States, do hereby certify that the foregoing is a true and correct copy of the records and proceedings in the case of William J. De'Treville against Robert Smalls rendered as aforesaid, together with all things relating to the same, as appears by the records now on file in my office.

Given under my hand & seal of said court, at clerk's office, in the city of Columbia, this 8th day of December, A. D. 1875.

[SEAL.]

J. E. HAGOOD,
*C. C. C. U. S. Dist. of S. C.*

(Indorsement on cover:) No. 366. William J. De'Treville, plaintiff in error vs. Robert Small. S. Carolina C. C. U. S. Filed 22d March, 1876.

IN THE

# SUPREME COURT OF THE UNITED STATES.

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## OCTOBER TERM, 1878.

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WILLIAM J. DeTREVILLE, PLAINTIFF IN ERROR,

*vs.*

ROBERT SMALL.

---

## No. 102

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# BRIEF OF THEODORE G. BARKER,

*For Plaintiff in Error.*

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CHARLESTON, S. C.:
WALKER, EVANS & COGSWELL, PRINTERS,
Nos. 3 Broad and 109 East Bay Streets
1878.

IN THE

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM 1878.

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WILLIAM J. DeTREVILLE, PLAINTIFF, IN ERROR,

*vs.*

ROBERT SMALL.

---

No. 102.

*Appeal from Fourth Circuit, South Carolina District.*

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## STATEMENT OF FACTS.

1. William J. DeTreville prior to the 13th March, A. D. 1863, was the lawful owner of certain town lots in the town of Beaufort, in Beaufort County, South Carolina, which, with the improvements, were of the value of $8,000. These lots were known and designated on the old plat of the said town as lots Nos. 104 and 388, were known as abutting to the north on lot known as number 387, on the south by Prince street, on the east by vacant lots Nos. 26 and 27, and on the west by New street. 1

2. Upon these lots defendant, after 2d February, A. D. 1864, entered and claims title under two alleged "Mesne Conveyances," designated as, 1, "*Cash-Sale Land Certificate, No. 2*," and 2, "*Tax Sale Certificate, No. 238*," (Record pp. 8 and 9,) which "certificates" are as follows: 2

*First.* '*Cash Sale Land Certificate, No. 2*"

This certifies that at a sale of lands under and by virtue of the provisions of the eleventh section of an Act entitled "An Act for the collection of direct taxes in insurrectionary districts, within the United States, and for other purposes," approved

June 7, 1862, and under and by virtue of the direction and instructions of the President of the United States, issued in pursuance of the same, under date of September 16, 1863, held pursuant to due notice at Beaufort, in the Parish of St. Helena, in the District of Beaufort, in the State of South Carolina, on the twentieth day of January,
3 in the year of our Lord one thousand eight hundred and sixty-four, the tract or parcel of land hereinafter named, situate in the town of Beaufort, in the District of Beaufort, in the State aforesaid, and described as follows, to wit:

All of lot B, in block twenty-three (23), according to the plat recorded in the office of the United States District Tax Commissioners for the District of South Carolina, was sold and struck off to Robert Smalls, for the sum of six hundred and sixty-five dollars, he being a loyal citizen of the United States, and the highest bidder for the same, and that being the highest sum bidden for the same, the receipt whereof is hereby acknowledged and confessed. This certificate is given subject to all the provisions of said Act, and of the Act amendatory of the same, approved February 6, 1863.

Given under our hands at Beaufort, in the Parish of St. Helena, in the District of
4 Beaufort, in the State aforesaid, this second day of February, A. D. 1864.

A. D. SMITH,
W. E. WORDING,
WM. HENRY BRISBANE,
*United States District Commissioners for the District of South Carolina.*

*Second.* "United States of America, *Tax Sale Certificate, No.* 238."

This is to certify, That at a sale of lands for unpaid taxes under and by virtue of an Act entitled 'An Act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes,' held pursuant to notice, at Beaufort, in District of Beaufort, in the State of South Carolina, on the 13th day of March, A. D. 1863 the tract or parcel of land hereinafter described, situate in the Town of Beaufort, and State aforesaid, and described, as follows, to wit: Lot B, in
5 block 23, according to the Commissioners' plat, was sold and struck off to the United States for the sum of fifteen dollars and cents, being the highest bidder, and that being the highest sum bidden for the same; the receipt of which said sum in full is hereby acknowledged and confessed

Given under our hands, at Beaufort, this 2d day of April, A. D 1863

WILLIAM E. WORDING,
WILLIAM HENRY BRISBANE,
*Commissioners.*"

3. The action in this case was brought by plaintiff, at first, in the State Court in Beaufort County, and, on petition of defendant, was transferred to the Circuit Court of the United
6 States for the district of South Carolina.

4. The action is for *trespass quare clausum fregit*, and also "*to try the title*" to the land, from which plaintiff alleged he was ejected. The plea was the general issue "not guilty," (Record pp 1, 2 and 3,) but it was agreed on the trial that the defendant under the plea of the general issue "may prove

his title without pleading the same specially, his title being derived through, 1. "Cash Sale Land Certificate, No. 2," and 2, "Tax Sale Certificate, No. 238."—*Record p. 8, fol. 176.*

5. Plaintiff proved title in himself to date 13th March, 1863, when the property was, as is alleged, "sold and struck off to the United States for the sum of fifteen dollars and cents, being the highest bidder," and claimed title after that date, notwithstanding said alleged sale. 7

6. Defendant, in proof, admitted plaintiff's title prior to alleged sale, and offered in rebuttal of proof of title by plaintiff, and in proof of his own title, the certificates above set forth, which were objected to and exceptions taken.—*Record, p. 8.*

7. The jury found for defendant. 8

## ASSIGNMENT OF ERRORS.

Now comes the appellant, by Theodore G. Barker, his attorney, and assigns for error the following matters in the said judgment:

1. That the paper designated as "Tax Sale Certificate, No. 238," was not in law evidence of title, because it did not upon its face show that those proceedings had been taken by the commissioners prior to the alleged sale, which were essential to the regularity and validity of the sale under Acts of February 6th, 1863, and 7th June, 1862. 9

2. That the paper entitled "Tax Sale Certificate, No. 238," was a mere memorandum, that the tract or parcel of land therein described was struck off to the United States, and as such is not competent evidence of the facts which it recites.

3. That said paper is not a purchaser's certificate of sale under the act of February 6th, 1863, was not issued to any "person bidding at the sale, or to a person who, upon paying the purchase money," became "entitled to receive from the Commissioners their certificates of sale," as prescribed in the Act, and is not made evidence of title by the statute. 10

4. That the paper on its face shows that the Commissioners did not sell the plaintiff's land according to the enumeration required by Act of Congress, 7th June, 1862.

5. That the Commissioners had not power in law to make a new and different enumeration and description of the plaintiff's lots of land in valuing, assessing, advertising or selling
11 the same, from that by which they had previously been enumerated and described.

6. That plaintiff was not allowed at the trial to prove that the Commissioners did not apportion and charge the tax upon the lands or lots of ground in Beaufort County, South Carolina, as land owned by him, as the same were enumerated and valued under the last assessment and valuation thereof, made under the authority of said State or Territory previous to the 1st of January, A. D. 1861.

7. That plaintiff was not allowed to prove that the lots of
12 land owned by him were not described in the advertisement and notice of sale as required by law, or as the lot of the plaintiff, or by its situation and boundaries, or as enumerated in the last valuation and assessment thereof, made under the authority of the State previous to 1st January, 1861, or as enumerated on the old plat of the town of Beaufort, or by giving the streets and numbers thereon, by which said lots were known and recognized.

8. That plaintiff was not allowed to prove by one of the Commissioners that, during the period in which his land was
13 advertised and sold, as alleged, Beaufort County was under martial law; that the sales advertised by the Commissioners to be made at Beaufort were forbidden by an order issued on the Saturday preceding the sale by General Hunter, commanding the military district in which the lands advertised were situated; that said order was not formally revoked, and that under these circumstances the land was sold in March following the day of sale advertised,

9. That the evidence offered by defendant shows that the entire land in question was sold to the defendant in one lot,
14 and was not subdivided and sold in parcels, as, alone, the Board of Commissioners could have been authorized by the President to sell the same.

10. That the evidence of defendant, upon which the judgment rests, disclosed no appraisement of the lot and buildings of plaintiff in the town of Beaufort, made prior to said sale, as

required by the instructions of the President of 16th September, A. D. 1863, and there was no proof by which the Court or Jury could know whether the amount bid by defendant was one-third of the cash value, as so appraised, which, by said instructions, was a limitation upon the power of said Commissioners.

11. That the Act of Congress, approved 7th June, 1862, under which the defendant claims his title, is in conflict with the 4th clause, 9th Section, 1st Article, of the Constitution of the United States, in that the amount of the direct tax theretofore apportioned to the State of South Carolina, under the Act of Congress approved August 15th, 1861, as her quota of the direct tax, is increased by the addition thereto of a penalty of fifty per cent., and, thus, is not in proportion to the census or enumeration directed to be taken in the 3d Section of the same Article, whereby all direct taxes are to be apportioned among the several States.

## BRIEF OF ARGUMENT.

I. That "Tax Sale Certificate No. 238" is not in law evidence of title, because it does not, upon its face, show that those proceedings had been taken by the Commissioners prior to the alleged sale, which were essential to the regularity and validity of the sale under the Acts of February 6, 1863, and 7th June, 1863.

What were those proceedings?

Section 1 of Act of Congress, approved 7th June, 1862, provides: "That * * the direct taxes (which are by A. C., 15th August. 1861,) apportioned among the several States and Territories, respectively, shall be apportioned and charged in each State and Territory or part thereof, wherein the civil authority is thus obstructed, upon all the lands and lots of ground situate therein respectively, * * * * *as the said lands or lots of ground were enumerated and valued under the last assessment and valuation thereof, made under the authority of said State or Territory, previous to the first of January, Anno Domini eighteen hundred and sixty-one;* and each and every parcel of the said lands, *according to said valuation*, is hereby declared to be, by virtue of this Act, charged with the payment of *so much of the whole tax*, laid and apportioned by said Act upon the State or Territory *as shall bear the same direct proportion to the whole amount of the direct tax* apportioned to said State or Territory, *as the value of said parcels of land shall bear to the whole valuation* of the real estate, in said State or Territory, *according to the said assessment and valuation made under the authority of the same;* and in addition thereto a penalty of fifty per centum of said tax shall be charged thereon."

Section 13 provides: "That in case the records of assessments and valuation of the lots of land mentioned in the first section of this Act *shall be destroyed, or lost, so as not to come within the possession* of the said boards of Commissioners, they shall be authorized to take evidence of the same, or *to value and assess the same in their own*
19 *judgment, upon such evidence as may appear before them.*" * * *

Section 14 provides: "That the said Tax Commissioners shall keep a book or books, in which they shall enter, or cause to be entered, the amount or quota of said direct tax assessed on each tract or parcel of land, *which said amounts shall be distinctly stated in the advertisement or notice of sale, together with a description of the tract to be sold*, and an entry shall be made in said book or books of each tract sold, together with the name of the purchaser and the sum for which the same may have been sold. A transcript or transcripts of said book or books, duly verified by said Commissioners, and said books, when said commission shall expire, shall be filed in the office of the Secretary of the United States, and said books and transcripts, and copies of said books and transcripts, duly certified by the Secretary of the Treasury, shall be evidence in any Court in the United States."

20 Section 2 provides: "That on or before the first of July next, the President, by his proclamation, shall declare in what States, or parts of States, said insurrection exists, and thereupon the said several lots or parcels of land shall become charged respectively with their respective portions of said direct tax, and the same, together with the penalty, shall be a lien thereon without any other or further proceeding whatever."

Section 3 provides: "That it shall be lawful for the owner or owners of said lots or parcels of land within *sixty days* after the Tax Commissioners herein named *shall have fixed the amount*, to pay the tax thus charged upon the same, respectively, into the Treasury of the United States, or to the Commissioners herein appointed, and take a certificate thereof, by virtue whereof the said lands shall be discharged from said tax."

Section 7 (as amended by Act of Congress, approved February 6th, 1863,) provides: "That the said Board of Commissioners shall be required, in case *the taxes* charged
21 upon the said lots and parcels of land shall not be paid *as provided for in the third section of this Act*, to cause the same to be advertised for sale in a newspaper published in said town, parish, district or county where situate, and if there be no newspaper published in the town, parish, district or county, or if the publisher thereof refuse to publish the same, then in any other newspaper, to be selected by said Commissioners in said district, or in the City of Washington; *for at least four weeks*, and by *posting notices of said sale* in three public places in the town, parish, district or county, within which said lands are situate, at least four weeks previous to the day of sale." * * *

The "Tax-sale Certificate No. 238," relied on here as a "mesne conveyance" or muniment of title, and introduced as in itself evidence that the title of plaintiff has been divested,
22 does not show the amount or quota of said direct tax assessed "on the tract or parcel of land alleged to have been sold;" nor that said parcel or tract of land was enumerated and valued and charged with its portion, according to the last assessment and valuation thereof, made under the authority of said State previous to 1st January, 1861; nor that said

tract is within a district wherein, by the President's proclamation, before 1st July, 1863, an insurrection has been declared to exist; nor that the records of assessments and valuations of lands in the State of South Carolina were destroyed or concealed or lost, so as not to come within the possession of the said boards of Commissioners; and that they thereupon had taken evidence of the same, or had valued and assessed the same in their own judgment upon evidence appearing before them; nor, if such were the facts of the case, does the certificate show what evidence was secondarily resorted to, in place of that primarily prescribed by the Statute; neither does the said certificate show the date when the Commissioners fixed the amount of the said tax, nor that sixty days thereafter had elapsed and the tax had not been paid by the owner of the said lots of lands, nor that the requisite time after expiration of said sixty days and before the sale had elapsed;

Nor does it show that the Commissioners had advertised for sale the land as the land of the plaintiff as owner with the amount or quota of the direct tax, together with a description of the tract to be sold, in a newspaper published in the town or County of Beaufort, nor that the publisher had refused, and, *therefore, they had advertised the same* in some other newspaper selected by the Commissioners in said District, or in the City of Washington, and, in that case, what newspaper, nor that they had posted notices of said sale for at least four weeks after the expiration of said sixty days, allowed the owner as above and before the sale in three public places in the town of Beaufort.

It fails to show, that the Commissioners kept a book or books in which they caused to be entered the amount or quota of said direct tax assessed on each tract or parcel of land; that said amounts were stated in the advertisement or notice of sale, together with a description of the tract to be sold, nor that an entry was made in said book or books of each tract sold, together with the name of the purchaser, and the sum for which the same may have been sold, and lastly, the "certificate" does not purport to be a transcript of said book or books or a copy of such transcript, and does not recite

the proceedings of which it is sought to be made the evidence in this case.

Defendant 27

The paper designated "Tax-sale, Certificate No. 238," as relied on by the ~~plaintiff~~, is offered, *either* as a substitute for the record of the judgment of forfeiture and of equal solemnity and potency, as the adjudication or judical findings in a case of "office found," *or*, it takes the place of a deed in the usual form, adopted in tax sales made by the officer authorized to make the sale and to record the transfer of the title.

Let it be assumed for the sake of argument, that in the case certified, to wit, where the land offered for sale was not sold by the United States to a purchaser or purchasers, but
28 was "struck off" by the Commissioners "to the United States," that, in such case, the Act of Congress contemplated the making out of their "certificate of sale" by the Commissioners.

Let it be assumed, also, that the act not only contemplated such certificate, but prescribed it in terms, and not only prescribed its execution and issue, but also declared that it should be received in all courts and places, as *prima facie* evidence of the regularity and validity of said sale.

Nevertheless,we contend that the paper entitled "Tax-sale,
29 Certificate, No. 238" is utterly defective, and valueless as *prima facie* evidence of title, does not meet the requirements of law, and should not have been admitted in proof.

*First*, we will consider it as taking the place of a deed under a tax sale.

It will not be pretended that the Act has prescribed any form for such certificate.

If admitted by the Court to the position of a deed under tax sale, we must take it for granted, that it will be tested by the rules adopted by the Courts as to such deeds where they
30 are required by Statute to be received as *prima facie* evidence.

It should seem to be an obvious proposition that where, (as in this case,) a certificate or deed is offered as evidence, it must be meant to be taken as proof of the *facts recited* in the certificate or deed. Conclusions of law are not the subject of proof. So much, therefore, as is mere matter of legal

inference from any assumed facts may be discarded from the certificate as worth nothing for the purposes of proof. For example, a statement in such a paper or deed, that a sale had taken place, is a fact, but, the statement, that it took place 31
"under and by virtue of a certain law," or "in conformity with law," is matter of legal inference for the Court, to be deduced from facts proven; it is not, from its nature, a thing to be certified to, as a fact, by the tax officer, who conducts the sale.

In the case of Ronkendorff vs. Taylor, Lessee, 4 Peters, 349, Mr. Justice McLean delivering the following opinion of the Court, says:

"The Court recognizes the correctness of the principle contended for by the counsel for the plaintiff in error, that in an *ex parte* proceeding of this kind, under a special authority, great strictness is required To divest an individual of his property, against his consent, every substantial requisite of the law *must be shown* to have been complied 32
with. No presumption can be raised in behalf of a collector who sells real estate for taxes to cover any radical defect in his proceeding, and the proof of regularity of the procedure devolves upon the person who claims under the collector's sale.

"It will, therefore, be perceived that the officers intrusted with the power of sale exercises a naked statutory and special authority, depending alone upon the high prerogative of the State *and the letter of the law* for its support." (Blackwell on Tax Titles, p. 34.)

The rule applicable to such a power is thus laid down by Judge Catron (Young vs. Lorain, 11 Illinois, 736), in reviewing a guardian's sale:

"This is a proceeding not according to the course of the common law, but a special jurisdiction conferred by the statute, and, although in a Court of general common law and chancery jurisdiction, yet, when a Court undertakes to exercise this ex- 33
traordinary jurisdiction, which is not in conformity with either, *it must appear upon the face of the record or proceeding itself that the contingency existed, or, at least, was alleged*, which authorized it to proceed under the statute and make the order." (Ibid 39.)

The language of Chancellor J. Marshall is similar. He says in Thatcher vs. Powell, 6 Wheaton, 119:

"These publications are indispensable preliminaries to the order of sale. They do not appear to have been made. The judgment against the land was given at January term, 1802, on motion, *without it appearing by recital or otherwise* that the requisites of the law in this respect had been complied with, and that the tax remained unpaid. We think *this ought to have appeared in the record.* The argument is that the judgment, for these errors in the proceedings of the County Court, may bevoidable, but is 34
not void. That until it is reversed it is capable of supporting those subsequent proceedings which were founded on it. We think otherwise.

"In summary proceedings, where a Court exercises an extraordinary power under a special statute prescribing its course, we think that course ought to be exactly observed, *and those facts especially which give jurisdiction ought to appear in order to show that the proceedings are coram judice.* In other words, *all of the facts* which are essential to

the exercise of the power must *affirmatively appear on the face of the record*; they cannot be supplied by proof, or made out by intendment. The authorities on this point are uniform." (Blackwell Tax Titles, p. 39.)

"If, on the other hand, this special authority is conferred upon an inferior tribunal
35 of limited jurisdiction, or *upon Commissioners*, the rule is *still more strict* It is thus laid down: Where a special authority is delegated by statute to particular persons, or to any inferior tribunal, affecting the property of individuals against their will, the course prescribed by law must be strictly pursued *and appear to be so upon the face of the proceedings*, or the power is not well executed.—*Ibid* 39, *citing Davidson vs. Gill*, 1 *East*, 64; 7 *Term*, 627; 1 *Burrows*, 377; 2 *Burrows*, 2,244; *Gilbert vs. Columbia Telegraph Co.*, 3 *Johnson's Cases* 107."

"Under the Act of 1803, says Chief Justice Marshall, in the case of McClean vs. Ross, 5 Wheaton, 116, the power of the Court to render judgment in such cases for the sale of land, is founded on there being no personal property from which the tax might be made *The jurisdiction of the Court depends on that fact.* Whether it is necessary that its existence should be shown in the judgment of the Court, is a ques-
36 tion on which the State Courts appear to have decided differently at different times. But the last, and we believe the correct, opinion, reported in 5 Hayward, 394, establishes the general principle, that *in these summary proceedings every fact which is necessary to give jurisdiction ought to appear in the record of the Court.*"

In the case of *Games et. al. vs. Stiles, 1840, 14 Peters, U. S. Supreme Court, 322*, this Court thus recognized the principle:

"It will be found," says Mr. Justice McLean, "from the Ohio Reports, that the Supreme Court has required a claimant under a tax title to show before his title can be available, a substantial compliance with the requisites of the law, etc.

"In the case of the Lessee of Holt's Heirs vs Hemphill's Heirs, 3 Ohio Rep., 232, the Court decided that a deed from a collector of taxes is not available to transfer the
37 title without proof that the land was listed, taxed and advertised, etc."

The Act of February, 1821, provides that "all deeds of land sold for taxes shall convey to the purchaser *all the right, title and interest of the former proprietor*, and to the land so sold, and *shall be received in all Courts as good and sufficient evidence of title* in such purchaser."

Under this and similar provisions which are found in the various laws up to 1824, the Courts of Ohio seem *never to have held that the deed on a tax sale is admissable as evidence of title unaccompanied by proof* that the substantial requisites of the law in the previous steps had been complied with. The collector, or person making the sale, was considered as acting under a special authority, and that his acts must be strictly conformable to law to divest the title to real property without the consent of the owner And the purchaser at such sales is held bound to see that the requirements of the law which subjected the land to sale for taxes has been strictly observed. *These*
38 *principles have been repeatedly sanctioned by this Court.*"

See also *Early vs. Doe, 16 Howard, 610, (1853.) Little vs. Herndon, 10 Wallace, 26.*

"Indeed, all essential links in every chain of title, whether they are evidenced by record or deeds, or rest merely on parol *must be affirmatively proved* by the party who sets up the title." (Williams vs. Peyton, 4 Wheaton, 77, and Reeds vs. Morton, 6 Mo., 17.)

Such are the requirements of the common law. Nor when the Legislature declares that the tax deed shall be received as *prima facie* evidence can it be said in the most extreme view to do more than substitute the declarations or recitals of 39
facts in the deed for the proof of those same facts which the common law requires to be established *aliunde*. How can the tax deed be evidence at all, unless it sets forth facts? How can a certificate of sale, which merely states the fact that a sale took place, be regarded as proof of any fact beyond the bare fact of sale?

We have assumed, for argument, that the Court in this case gives the paper entitled "Tax-Sale Certificate No. 238" the place of a tax deed "in the usual form." This has been construed to mean "a deed which *substantially recites the* 40
*material steps which the law requires to constitute a valid tax sale*, including a proper description of the land, the price paid, with words granting the land to the purchasers, &c., and *if it fail to recite any fact material to the sale*, the party relying on it must prove the fact *aliunde*. (Blackwell, p. 89, citing Bonnell vs. Roane, 20 Arkansas, 114.)

Tested by this rule, the paper designated as "Tax-sale Certificate No. 238" will be found to furnish no evidence in itself of the facts on which the divesting the title of the plaintiff depends, and is not evidence of title duly acquired 41
by the United States.

"So where the law required the assessment roll to be accepted in writing on the back thereof by the Board of Commissioners, signed and attested by their clerk, and the only entry on the back of the assessment roll was that it was 'examined by the board and ordered to be filed with the clerk.' This was held not an acceptance of the roll, and parol testimony of the acceptance being held incompetent, the tax sale was held invalid; and *the omission of the deed to recite* that the assessment roll was accepted *is evidence by implication* that *it was not accepted*, in those States where the recitals of the deeds are made *prima facie* evidence of the regularity of all the prior proceedings." Ibid, 118, citing Long vs. Burnett, 13 Iowa, 29. "In one case (in Indiana) it did not appear that the notice of the motion contemplated (by the Statute) had been given, but the record recited, 'that the Court was satisfied that all the proceedings 42
required by law had taken place,' &c The Court held *that the recital amounted to nothing. The record must show what those proceedings were*, in order that the appellate Court may have an opportunity to determine *whether they were all* that the Statute required to give the Circuit Court jurisdiction (Denter vs. State, 4 Blackford, 238, S. P. in Smith vs. State, 5 Blackford, 65;) and in another case, (Williams vs. State, 6 Blackford, 36) the Court held that the proceedings required by law to take

place anterior to the Collector's return, *must also appear upon the record*, as well as the notice of the motion."

"In Kentucky, from an early day, the Courts held that the deed was *prima facie* evidencce *of the facts recited.* They require all the per-requisites to be established, but
43 *so far as the deed recites them* it is good evidence of the performance until rebutted by testimony, (Morton *vs.* Mung. B. Munroe, 70;) Lamb *vs.* Gillitt, 6 McLean, 365,) cited Burrough on Taxation, p 333.

It will be borne in mind that in this case the paper entitled "Tax-sale Certificate, No. 238, was offered in evidence by defendant as "a *Mesne Conveyance*," through which his title was derived, and as if specially pleaded. (Record p 8, folio 176.) It was his sole proof of the link in the chain of title by which the title of plaintiff was said to have been divested, and by which it was transferred to the United States,
44 (a link involving the entire procedure under the Act.) As such proof its introduction in evidence was objected to on trial. (Record p. 10, folio 21;) (same, page 11, folio 22.) No other proof on this point was offered by defendant in aid of the "certificate," by which it might have *become* evidence.

"When the Statute prescribes the form of the deed, it must be in that form, in order to have the effect of *prima facie* evidence for the purchaser, and when no form is prescribed *it must show substantially the authority under which it is executed*, to have the effect intended by Statute. It is not every paper under seal executed by the proper officer, that is to exercise such potent influence." Burroughs on Taxation, 335, citing 8 Ohio, N. S., 430; 13 Ohio, N. S. "The simple production of a deed from an
45 authorized officer is not sufficient to establish title." (Goewey *vs.* Wrig., 18 Ill., 238;) Varick *vs.* Tallman, 2 Barb., 113; Little *vs.* Hendon; 10 Wallace, 64. "The proceedings which authorize him to sell must be proved. (Harvey *vs.* Mitchell, 11 Frost, 575.) "A tax title cannot be aided by *intendment.*" (Coney *vs* Cummings, 12 La., An. 748.) *The officers' certificate required by Statute is only evidence of his own acts. Nor is it prima facie evidence of them unless the particular acts done are stated.* A general statement, that "the provisions of the law have been complied with," is *not* sufficient. (Morton *vs* Reeds, 6 Meis, 64;) Brown *vs.* Veazie, 25 Maine, 359; "Hilliard's Law of Taxation, 490.

"Tax-sale Certificate, No. 238," does not even recite such a general statement by the two Commissioners (out of three,) who signed it. The nearest approach to it is in the words "under and
46 by virtue of an Act, etc.," which words do not recite *a fact*, and cannot be regarded as proof of "essential pre-requisites" or "material steps" to a valid sale. The only facts beyond the bare fact of a sale, the place of sale and a time named, which may be said to be recited, are found in the words "at

a sale of lands for unpaid taxes," and the words "held pursuant to notice." These expressions, according to the rulings of the Courts, would amount to nothing. The former is wholly insufficient as an averment that the 47
specific amount of tax, charged upon the land of the plaintiff, was, under the circumstances, and at the date contemplated by the law, "unpaid" by the owner. The latter is equally faulty as a recital, that the special notice or notices required by the law were published and posted in the manner and at the times and places commanded by the Statute.

In the matter of the description of the land the pretended "certificate" is equally defective in not showing that the essential requirements of the law have been complied with.

It fails to show by what description, and in what name it 48
was advertised. It does not set forth the notice or advertisement.

It does not even state that the land was assessed; still less, that it was assessed to the known owner; and in general it does not show by its recitals that those facts existed upon which depended the due execution of the power.

"To give effect to such sale it must appear that the case existed upon which the treasurer was authorized by law to make sale, and that he has duly complied with all the pre-requisites of the law in conducting the sale. * * *

"These are conditions precedent, and unless performed, no estate vests in the purchaser. * * 49

So, under an Act which required a return from a city clerk of all taxes assessed for the year 1863, or any previous year or years which remained "delinquent *and* unpaid," a return under the city seal and the hand of the clerk of a list of those taxes remaining "delinquent *or* unpaid" was held defective, and to have conferred no authority to sell the lands for such taxes. And *a certificate* attached to the return and signed by the mayor and city clerk, that the same was a true and correct list of all such taxes "remaining delinquent and unpaid" *did not cure the defect*.—Doe vs. Hinelick, 4 Blackford, 494. Reeds vs. Morton 9 Mis., 878." Ib. 492.

"A deed of land sold for taxes *should show* that a tax was laid upon the land. Conrad vs. Darden, 4 Yerg, 307. A tax deed in general should recite enough to show an authority to sell.—Cooley's Law of Taxation, p. 353.

"The purchaser at a tax sale must show the substantial regularity of all the proceeding. The deed of conveyance would not stand for this evidence It would prove 50
its own execution, nothing more. The power to execute it must be shown before the deed itself could have any force, for *no officer can make out his own jurisdiction to act by the mere fact of acting*. In all administrative proceedings the facts upon which jurisdiction depends must always be shown by him who claims anything under its exercise. This principle is undisputed. Is leads us inevitably to this conclusion: that whoever

claims land under a sale for delinquent taxes, must take upon himself the burden of proving that taxes were duly assessed. which were a charge upon the land, and that the successive steps were taken which led to a lawful sale thereof at which he or some one under whom he claims became the purchaser.—Stead's Lessee vs Course,
51 4 Cranch 403; Williams vs. Peyton, 4 Wheaton, 77, and other cases cited in note 1, p. 354. Cooley on Taxation "

"A statute which declared that the deed should be evidence of the regularity of the sale was held to prove *only* the regularity of the proceedings *at the sale*, leaving the purchaser still under the necessity of showing the regularity of the proceedings. Tallman vs White, 2 N. Y., 66; Beekman vs. Bigham, 5 N. Y., 366; Westbrook vs Willey. 47 N. Y, 457, and other cases cited in Cooley, p. 355, note 1."

" Where the statute makes the deed *prima facie* evidence that the requirements of the sale have been complied with it is necessary. first, that the holder of the tax title should prove the performance, by the assessor and collector, of the several acts which are conditions precedent to the power to sell; and *then* the contestant is put to the proof that the requirements of the law, as to time and manner of sale, were not com-
52 plied with (Robson vs. Osborn, 13 Tex., 298). So a statute which makes the deed evidence of a title in fee simple in the owner, is held to be evidence *only* of such a title *after* the right to give the deed has been shown by proof of anterior proceedings that support it." (Cooley on Taxation p. 355.)

"As to the necessary recitals in the deeds, see McDermott vs Scully, 27, Arkansas, 126; Brown vs Hogle, 30, Illinois, 119; Wetherbee vs. Dunn, 32 Cal., 106." (Cooley, p. 362, note 4.)

" So one claiming under a deed from the Collector of the United States of the land sold for the direct tax, must show that everything was done which the law required to be done before making the sale, and the *deposition of the collector in general terms, that the sale was made in exact pursuance of the Act of Congress without specifying what was done, is not proper evidence of the fact.* Evidence of the various proceedings required by law before the sale should be adduced to enable the Court to determine whether the
53 authority to sell was properly exercised." (Jessee vs. Preston 5 Gratten, 120.) " The term *prima facie* implies that the deed required to be supplemented by other evidence in order to sustain a claim made under it (vide Williams vs Kirtland, 13 Wall, 306), and it is held, under an act of the nature referred to (making the tax title evidence) that it is evidence *of the regularity of the sale* only, and a party claiming title under it must show affirmatively that all of the proceedings anterior to the sale, in the assessment and return of the taxes, have been had in conformity to the statute." (Latimer, vs. Lovett, 2 Dong., 204; Scott vs. Detroit, 1 Dong., 121.) " Thus where a statute makes a tax deed conclusive evidence of the recitals in it, a tax title will be invalid where there are no recitals or other proof of the performance of several of the official acts which the laws upon the subject of the listing and appraisments of the property required." (Gavin vs Schuman, 23, Ind., 32.) "So although in construction of
54 a statute some preliminary facts are to be inferred from the conveyance, and the burden of proof is shifted from the purchaser to the owner, yet *the indispensable fact of the publication of notice is not one of those facts which can be thus inferred*, and without *affirmative proof* of legal notice the *deed is not evidence* of the regularity and legality of the sale, and, consequently, conveys no title " (Garrett vs Wiggins, 1 Scam., 335 ) "And a tax title will not prevail against a prior valid title, *unless it be shown* that all the prerequisites of taxation and sale have been complied with; *notwithstanding a statute which provides* that the deed ' shall be *prima facie evidence* that the sale was regular

according to the provisions of this act,' which does not make the deed evidence of anything *except the regularity of the bare sale itself.*" (Bridge vs. Brackin, 3 Chand, Wis., 75. "And a similar provision does not make the return of the collector on the warrant, stating his proceedings in advertising and selling the estate, evidence that he had complied with the requisition of the statute." (Wescoat vs. McDonald 8 Shep., 402.) "So a statute declaring the deed conclusive evidence of the regularity of the sale, applies only to the proceedings to be had *after the right and power to sell are acquired.* It is doubted whether such deed is *prima facie* evidence of the facts on which his power to sell depends." (Tallman vs. White, 2, N. Y., 66) "So it is held that the collector's deed under the statute furnished no evidence that the tax had been legally assessed, or that it had not been duly paid, or that the land was not exempt from taxes. Also, that such deed was *prima facie* evidence, and nothing more, of the regularity of the proceedings relative to the purchaser's title, so far as the acts of the collector were concerned." (Parker vs. Smith, 4 Blackford.) A similar construction was given to a similar statute in Wisconsin (Budge vs. Brocken, 3 Chandler, 75). The Wisconsin statute enacts that "the deed shall be *prima facie* evidence of the regularity of all the proceedings, from the valuation of the land by the assessor inclusive, up to the execution of the deed." (Delaplaine vs. Cook, Wis., 53.) "The decisions are harmonious that such a deed is *prima facie* evidence and only *prima facie* of the regularity of the sale. (Blackwell on Tax Titles, p. 89.) "The statute of Arkansas also enacts that a deed in the usual form should be 'sufficient evidence of the authority under which the sale was made, the description of the land, and the price at which it was purchased.'" It was held (in Parker vs. Overman, 18 Howard, U. S., 142) "that the term, 'sufficient' meant merely *prima facie*, and not conclusive." (Ib. 89.)

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In the case of Thomas vs. Lawson, (1858) 21 Howard, 331, the law of Arkansas provided that "the deed so made by the Collector shall be acknowledged and recorded as other conveyances of lands, and *shall vest in the grantee, his heirs or assigns, a good and valid title, both in law and in equity; and shall be received in evidence in all Courts of this State, as a good and valid title in such grantee, his heirs or assigns, and shalll be evidence of the regularity and legality of the sale of such lands.*"

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By another provision of the Statute the Auditor's powers and acts are placed on the same footing as those of the Sheriff and Collector; thus it was enacted that "the Auditor shall execute under his hand and the seal of his office and deliver to each person purchasing lands or lots at such sale, a deed or conveyance, in which he shall describe the lands or lots sold, and the consideration for which the same were sold, and *shall convey to the purchaser* all the right, title, interest and claim of the State thereto." And by Section 142: "The deed so made shall vest in the grantee, his heirs or assigns, a good and valid title, both in law and equity, and shall be received in all the Courts of this State, as evidence of a good and valid title in such grantee his heirs or assigns, and shall be evidence that *all things required by law to be done to make a good and valid sale were done both by the Collector and Auditor.*"

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"In the interpretation of this provision *in pari materia*, the Supreme Court of Arkansas, in the case of Merrick and Fernes vs. Hutt (15 Arkansas Reports, p. 338) says: 'A more comprehensive provision could hardly be found, and it might seem at first view to make the tax title from the Auditor valid against all objections. *But that was not the design.* The evil to be remedied was that the entire burden of proof was cast on the purchaser, to show that every requisite of the law had been complied with, and the deed of the officer was not even *prima facie* evidence of *the facts therein stated.*

The general and prevailing principle was that to divest the owner of land by a sale for taxes, every preliminary step must be shown to be in conformity with the Statute; that it was a naked power, not coupled with an interest, and every pre-requisite to the exercise of that power must precede it, and that the deed was not *prima facie* evidence
59 that these pre-requisites had been observed. The intention and scope of the Statute were to change the rule so far as to cast the *onus probandi* on the assailants of the tax title, by making the deed evidence of the title of the purchaser, *subject to be overthrown* by proof of non-compliance with the substantial requisites of the law. *Proof, then, that any of the substantial requisites of the law had been disregarded*, or that the taxes have been paid, no matter by whom, would be sufficient to destroy the tax titles whether emanating from the Auditor or Collector.'" * * *

In the case before the Court the language of the Statute has not made the Commissioner's certificate *prima facie* evidence of anything before the sale.

60 The words of the Act of February 6, 1863, (Sec. 7) are "which said certificate shall be received in all Courts and places as *prima facie* evidence of the regularity and validity of *said sale*, and of the title of the said purchaser or purchasers *under the same*."

The Act does not say the regularity and validity of the proceedings. Nor does it make the certificate *prima facie* evidence of the title, in so far as it may depend on the material steps in the proceedings *before* the sale, but it expressly limits it to *prima facie* evidence of "the title of the
61 said purchaser or purchasers *under the same*," that is to say, in so far as the title depends upon and is "under" the bare sale itself. In this the grammatical construction of the sentence accords with the rule of strict construction by the Courts, of such provisions of the Statute law, passed in derogation of the common law, as is shown in the citations above.

Nor is any additional force given to the effort to make the certificate evidence, by the words of the last clause of the section, which is as follows: "*Provided, further*, That the certificate of said Commissioners shall only be affected, as *evi-*
62 *dence of the regularity and validity of sale*, by establishing the fact that said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provision of this Act."

The attempt made in this case, is to construe this clause as making the certificate *conclusive* evidence, except as to the

excepted facts, which are permitted to be established. Assuming that it would be competent for the Legislature to accomplish such a purpose, within the bounds of the Constitution, the question here is, "have the words used made the certificate conclusive evidence of anything more than the regularity and validity of the bare sale itself?" 63

To say, that the words make it conclusive evidence of the other independent and distinct steps or conditions *prior to the sale*, such as the assessment, apportionment, &c., upon which the execution of the power in this case rests, and upon which it is far more critically dependent, than upon the mere sale itself, to depart from the rule of rigid and jealous construction, adopted by the Courts in such cases, and to extend the language beyond the natural and necessary force of the words, in aid of a presumed intention of the Legislature. 64

"One of the New York Statutes declares, that the Comptroller's deed shall be conclusive evidence of the regularity of the sale," but the Courts of that State hold, this relates solely to the auction and notice of sale, and does not dispense with proof of the other pre-requisites of the law; in other words, the deed is evidence of the regularity of the Comptroller's sale, but *not of his power to sell*" (Doughty vs. Hope, 3 Denio, 595; Tallman vs. White, 2 Comstock, 69; Striker vs. Kelly, 2 Denio 329. 331; Varick vs. Tallman, 2 Barbour, 117, 118; Beekman vs. Bigham, 1 Selden, 366).

Another Statute of that State declared, that the deed "shall vest in the grantee an absolute estate in fee simple" These words were held to be merely descriptive of the estate which the purchaser would acquire under the Statute, when the authority of the officer to sell had been established by proof that all the requirements of the Statute have been fully complied with, (Jackson vs. Morse, 18 Johnson's, 441; Rowland, vs. Doty, 1 Harrington's Ch., 3.) 65

The Michigan Statute, of April 13, 1827 declares, that the tax deed shall vest in the purchaser "an absolute estate in fee simple." &c., and be "conclusive evidence that the sale was regular according to the provisions of this Act." On the construction of this Statute the Supreme Court of that State have twice held, that the tax deed was *only* conclusive evidence, *that the sale itself was made at the time and place* and *was conducted by the person* and *in the manner prescribed by law*, but that it was still *inadmissible* in evidence, unless *accompanied by proof* that *the taxes had been legally assessed and returned*, and that *all of the proceedings anterior to the sale* had been in strict conformity with the requirements of the Statute." Scott vs. Young Men's Society, 1 Douglass, (Mich.,) 121; Latimer vs Lovett, 2 Douglass, (Mich.,) 204. 66

By the Act of February 19, 1827, the Illinois Legislature declared that the deeds should "vest a perfect title in the purchaser. unless the land should be redeemed according to law, or the former owner shall show that the taxes for which it was sold had been actually paid according to law, or that the land was not legally subject to tax law."

In Garrett *vs.* Wiggins, 1 Scammon, 335, the Supreme Court of Indiana, in giving a construction to this Statute, state the rule of the common law as to the burden of
67 proof, and the strictness required of this class of cases, concede the power of the Legislature to alter these rules, admit that it has done so to some extent in this very instance, that under this Statute several preliminary facts to a legal sale by the auditor are to be inferred by his conveyance, and the responsibility of proof shifted from the purchaser to the original owner, but the Court deny that this Statute will, "by any fair construction, warrant the opinion that the auditor selling lands without authority, could by his conveyance transfer the title of the rightful owner." They say that to consummate his authority, the law imperatively requires him to *publish notice of the time and place of sale*, that the publication of this notice is *not one of those facts which can be inferred from his conveyance* and that without *proof* of this fact the auditor's deed is not evidence of the regularity and legality of the sale and consequently conveyed no title te the purchaser."

That the Legislature possessed competent power to change the common law rule of
68 evidence and *declare that the tax deed itself* shall be received in all Courts as *prima facie* evidence; that all the pre-requisites of the law have been complied with, and thus shift the *onus probandi* from the shoulders of the purchasers to those of the owner is conceded." Blackwell on Tax Titles, 79. Pillow vs Roberts, 13 Howard, 472. But that the Legislature has the further power to declare the deed *conclusive* evidence of title is denied." Ib.

"When such arbitrary power has been exercised by the Legislature the Courts have given a strict construction to the law, and have not extended its unjust operations *beyond the very words of the Statute*." Blackwell 82.

"A Legislative Act says Mr. Cooley, 'which should declare a tax conveyance conclusive evidence that the title of the former owner was divested, and was passed by the deed to the purchaser, could only be supported under the sovereign Legislative
69 power to frame and change at its will the rules of evidence. That power is confessedly great but it is not unlimited; it is a power to shape and mould for the purposes of justice the rules under which parties are to make a showing of their rights, *and not a power to preclude them from showing them* Cooley L. of Tax., 223.

"A statute, therefore, which should make a tax deed conclusive evidence of a complete title and preclude the owner of the original title from showing its invalidity would be void, because not a law regulating evidence, but an unconstitutional confiscation of property" Ib. 224; note 1, citing McCready vs. Sexton, 29 Iowa, 356. Under a provision that before issuing a warrant for collection of a local assessment, the assessment shall be examined and certified as correct by street commissioners and the attorney and counsellor of the city, *which certificate shall be conclusive evidence of the regularity of the proceedings*, it has been decided that the certificate would *only cover the formal* proceedings. It does not determine that the assessment is made against the
70 proper persons." Newell vs. Wheeler, 48 N. Y.; 486

We have heretofore, in argument, considered the "Tax sale Certificate, No. 238," as if it stood in the place of a deed prescribed by the statute and subject to the rules of the law of tax deeds, and have shown by the authorities that as such it is void as evidence of title.

*Second.* We have suggested that it might perhaps be regarded by the Court not as the equivalent of such a deed, but as a substitute for the record of the judgment of forfeiture, and of equal solemnity and potency as the adjudication or 71
judicial finding in a case of "office found."

Examined in this light, this alleged "certificate" will be found wholly insufficient, as such a substitute, in all the essentials of such a record, in that it does not present on its face even the recital or statement of the several essential prerequisites to the due execution by the commissioners of the power asserted by them. For this reason, if for no other it should not have been admitted on the trial as evidence of title.

A conspicuous feature of every record is, that by its com- 72
pleteness it proves itself and the omission of any material step in the proceeding, which is made up of successive and independent links in the chain would render the record void as evidence. The authorities already cited fully sustain these positions.

But there are in this Act of Congress itself certain very clear provisions which would forbid the Court from dealing with this "certificate" in evidence of title, as a substitute for the record. The Act has itself provided for the establishment of a record, and made the record so provided, evidence 73
by express terms, *excluding any substitute therefor*, as evidence of the matters of which it is made the prescribed evidence.

Section 14 of the Act of 7th June, 1862, as we have shown above, provides that the Commissioners shall keep a book, or books, in which they shall enter the amount or quota of said direct tax assessed on each tract or parcel of land, which said amounts shall be distinctly stated in the advertisement or notice of sale, together with a description of the tract to be sold, and an entry shall be made in said book or books of each tract sold, together with the name of the purchaser and the sum for which the same may have been sold. The section then provides as follows:

"*A transcript or transcripts, of said book, or books, duly verified by said Commissioners, and said books when said Commission shall expire shall be filed in the office of the Treasury* 74
*of the United States, and copies of said books, and transcripts, duly certified by the Secretary of the Treasury, shall be evidence in any Court of the United States*" * *

In the face of this distinct enactment, prescribing what shall be the record, how it shall be verified, and how exemplified for the purpose of evidence, in the Courts, of the

proceeding by which the divestiture of title is accomplished, it will scarcely be pretended, that any substitute for such record can be admitted in evidence of the material facts
75 which the record is intended to establish.

It will not be pretended that "Tax-sale Certificate No. 238," is such "transcript." It could not be taken to be such transcript, unless, to begin with, it purported to be a copy of a transcript from the book or books kept by the Commissioners; if it was the original transcript, it would show that it had been verified by the Commissioners, and that it had been filed in the office of the Treasury; and, if it was a copy of such transcript, (so verified and filed,) it would purport on its face to be so, and be also duly certified by the Secretary of the
76 Treasury of the United States.

The careful provisions of Section 14 cannot be ignored by the Court in construing the effect of the provision of Section 7, as amended by Act of February 6, 1863, which makes the certificate of the Commissioners *prima facie* evidence "of the regularity and validity of the sale, and of the title of the purchaser or purchasers under the same."

The effect of the provisions of Section 14 of the Act of June, 1862, when considered in connection with the Section 7, as amended by Act of February, confirms the construction
77 of the latter, contended for by us above, and compels the conclusion, that only of *the regularity and validity of the bare sale itself*, and the title of the purchaser *under it*, was the Commissioners' certificate *prima facie* evidence, while of all the other material steps in the process of divesting the title of the owner, the record duly kept, verified, and filed, or a transcript duly certified by the Secretary of the Treasury, are made the primary and *exclusive* evidence in Courts of justice.

Our argument has proceeded, so far, upon the admission, for the sake of argument, that the Act contemplated and pre-
78 scribed a certificate to be made by the Commissioners in the case (here certified), viz: that, wherein the land was not sold to a purchaser or purchasers, but was "struck off to the United States." We come now to the second error assigned, viz:

3. That the paper entitled "Tax-sale Certificate, No. 238,"

was a mere memorandum, that the tract or parcel of land therein described was struck off to the United States, and, as such, is not evidence of the facts which it recites. In connection with which we will also consider the third error assigned, viz: 79

3. That said paper is not a purchaser's certificate of sale under the Act of February 6, 1863, was not issued to any person bidding at a sale, or to a person, who, upon paying the purchase money, became entitled to receive from the Commissioners their certificate of sale, as prescribed in the Act, and is not made evidence of title by the Statutes.

And, first, as to the question, "whether in case the land is not sold to the person bidding at the sale, but is struck off to the United States, the Act prescribes a certificate of sale by 80 the Commissioners?" We are aware that, in the case of *Cooley vs. O'Connor, 12 Wallace, 391*, it was contended that no harm to the appellant was done by excluding, on another ground, a similar certificate of the Commissioners, inasmuch as the Act did not provide for such a certificate, and that the Court expressed *the opinion* that the Act *contemplated* a certificate in such case, as well as in the case of a person bidding, but we respectfully ask a reconsideration of the opinion so expressed, and trust that the Court will find itself led, upon a review of the terms of the Act, to a reversal of its judgment 81 on this point.

It may have been within the contemplation of the law makers to provide for a certificate of sale in such case, but has such possible intention been carried out in the Legislature? If such certificate be prescribed, when does the Act say it shall be made? to whom is it to be issued? by the Commissioners? and for what end is it to be prepared? Clearly, there is no one, at hand, at the time of the sale to whom the Commissioners shall deliver it. The land having been simply struck off to the United States, and there being 82 no representative of the Government appointed to receive their certificate, it cannot be delivered *then* by the Commissioners to any one, and the Commissioners must retain it. Does the Act say so? If it does not so provide, can the Court enlarge the Act so as to make a place for so idle a

ceremony? If it be assumed, that the certificate, so prepared and not delivered immediately after the sale, (as in the case of the certificate being given to the purchaser, or *person*
83 *bidding*,) is to be retained by the Commissioners, how long, and where is it to be kept, and until what particular time, or for what purpose expressed in the Act? Again, if the Commissioners are to make their certificate of sale, to whom do they certify? Will the Court, without words to warrant it, say, that it is to be kept until some future purchaser from the Government at some future sale (not mentioned in the section) shall apply?

The opinion of the Court on this point, uttered in the case of *O'Connor vs. Cooley*, was not necessary to the judgment in
84 that case; so that the Court is not bound by it. That case turned on the distinct question whether a certificate, signed by two (of three) Commissioners, was sufficiently executed. But if the Court shall adhere to its opinion, as there expressed, that the Act in such case "*contemplated*" a certificate, can the Court say, that the Statute expressly prescribes it? Or will the Court so construe the Act, by intendment against the settled principles of decided cases, as to say, that a certificate so assumed to be "contemplated," has, by the words of the Act, been made *prima facie* or conclusive
85 evidence?

The force of a tax deed or certificate prescribed by the words of an Act, or the effect as *prima facie* or conclusive evidence, cannot be given to "Tax Sale Certificate No. 238" without involving the Court in judicial legislation, adding words to a statute which itself operates in derogation of the common law rules of evidence, and that, in a case involving the divesting a lawful owner of a title to land, and vesting it in another. Such a construction of the statute is not necessary to its completeness or its operation. The letter of the
86 law and all the expressed intention of the act is completely fulfilled by confining its interpretation to the commissioner's certificate, which *a person* bidding at a sale is entitled, *as purchaser, to receive* from the commissioners. The language is not ambiguous. It is this:

"* * * And at the time and place of sale to cause the same to be severally sold for a sum not less than the taxes, penalty, and costs, and ten per centum per annum

interest on said tax, pursuant to said notice; in all cases where the owners of said lots or parcels of ground shall not, on or before the day of sale appear in person before the said Board of Commissioners and pay the amount of said tax, with ten per centum interest thereon, with cost of advertising the same or request the same to be struck off to a purchaser for a less sum than two-thirds of the assessed value of said several lots 87
or parcels of ground, the said commissioners shall be authorized at said sale to bid off the same to the United States at a sum not exceeding two-thirds of the assessed value thereof, *unless some person shall bid* a larger sum, and *in that case*, the same shall be struck off *to the highest bidder who shall, upon paying the purchase money*, in gold and silver coin, or in the Treasury notes of the United States, or in United States notes, or in certificates of indebtedness against the United States, *be entitled to receive from said commissioners their certificate of sale which said certificate* shall be received in all Courts and places as *prima facie* evidence of the regularity and validity of said sale, and *of the title of said purchaser or purchasers under the same.*"

There can be no mistake as to the meaning or constructions of the words as here used. The commisssoners are author- 88
ized "to bid off" the land "to the United States, at a sum not exceeding two-thirds of the value thereof, unless *some person* shall bid a larger sum." A distinction is here at once made between "the United States" and a "person who shall bid a larger sum," and "in that case" (what case?) Clearly, the case where "some person shall bid a larger sum," and where the land shall *not* have been for that reason "bid off to the "United States," "*in that case*," says the Act, "the same shall be struck off to the highest bidder. * *" What bidder? The United States? Clearly not. On the contrary, the 89
"*person who shall bid a larger sum than* the United States bid, viz: the two-thirds of the assessed value limit. Can it be doubted that "the highest bidder" is, here, some other than the United States? The Act goes on: "the highest bidder who" (can this word "*who*" be made to mean the United States?) "who shall, upon paying the purchase money * *" Here again the words imply a person to pay. Can the United States pay the purchase money? If so, to whom? To the Commissioners? To itself? Can "the United States" be a purchaser, in any true sense of the term, from itself? If 90
"the United States" could be held to be the "bidder", who is so to pay? that is, by what officer of the Government is the payment to be made? It will be noted that the payment contemplated is to be made in certain money or securities, which are to pass *from* the hands of the purchaser *to* the Com-

missioners, the language not only implying a person, as distinguished from a government, but excluding the idea of the United States or any officer of the Government holding such
91 "purchase money," and paying it to the Commissioners, in compliance with the bid.

Again, the Act says, "who" (that is "the highest bidder") shall, upon paying the purchase money, &c., be entitled (this cannot mean the United States) "to receive from the Commissioners their certificate of sale." If the construction, which the Commissioners, who invented "Tax-sale Certificate No. 238," placed upon this language be correct, then is the anomaly presented of "the United States" enacting the part of a person purchasing from its own Commissioners and pay-
92 ing the purchase money to them, and thereupon becoming entitled to receive from its own officers their certificate of sale.

This is in strict accord with the construction of these same Acts (7th June, 1862, and 6th July, 1863), adopted by this Court in the case of *Turner vs. Smith, 14 Wallace, 553*. On page 561, Mr. Justice Miller, for the Court, says: "The first and second Act are alike in the provision that the land shall be sold to the highest bidder for a sum not less than what is due on it for tax, interest, and costs. This, in both cases,
93 refers to bids by *others than the United States*. In reference to bids made by the United States, there is a change. The first statute made it imperative that the Commissioner should strike off the land to the United States at the amount of the tax, interest, and costs, *unless others bid* that, or a larger sum; and it is a fair reference that the Commissioners were *not authorized to bid at all for the land*, unless it be called a bid to strike it off to the Government, when *no one else* would take it for the tax, interest, and costs."

There can be no escape from the logical *reductio ad absur-*
94 *dum* of this construction, by any addition, omission or change of the words by intendment or construction. No certificate can be set up as *prima facie* evidence of title under *that* sale, except one held by a purchaser *at said sale*, received by him from the Commissioners, upon his having then paid the purchase money by right of his being the "person" who was "the

highest bidder" and who *bid a larger sum* than the limit fixed at which the Commissioners were authorized to bid of the same for the United States.

In the case of a "person" bidding a larger sum than the 95
Commissioners could bid for the United States, and so being "the highest bidder" and becoming the successful "purchaser" at the sale, and "paying" the purchase money, "there was manifest reason" for the law by which such person, as is provided in Sec. 7, "shall be entitled to receive from the Commissioners their certificate of sale; but in the *other and distinct case*, where no "person shall bid a larger sum" than the two-thirds of the "assessed value" of the land, and where the Commissioners in consequence thereof "bid off the same for the United States," there was no conceivable reason for the making out 96
of a certificate of sale. There was, in fact, no sale, and this for want of bidders. A certificate of the "*bid in*" by Commissioners for the Government could not perform the part of a deed under a tax sale, constituting a link in the chain of title to a purchaser. It would be the Government's own conveyance to itself. Neither could it take the place of *the record* of the proceedings culminating in the sale, by which the title of the owner of the land was divested, because (1) to make it such substitute would require very plain and unmistakable legislation, even if admissible under the Constitution; and (2) 97
the Act in this case has provided *otherwise* for such record, as well as its form, as the mode of its authentication.

The making out of the paper called "Tax-sale Certificate No. 238" by the Commissioners, was as much *ultra vires*, unwarranted by the Act, and nugatory, as their determination of its form was an invention of their own not prescribed by the Act, and as their subsequent delivery of it to the defendant as "a *mesne conveyance*" or, muniment of title, was unauthorized by law.

It is not, therefore, competent evidence of the facts, which 98
it pretends to recite, and is not made evidence of title by the Statute.

4. That the paper on its face showed that the commissioners did not sell the plaintiff land according to the enumeration required by Act of Congress, 7th June, 1863.

SEC. 1 of that Act provides that "the said direct taxes by said Act apportioned among the several States and Territories respectively, shall be apportioned and charged in each State and Territory, or part thereof, * * * * upon all the lands and lots of ground situate therein respectively, * * as the said lands
99 or lots of ground were enumerated and valued under the last assessment and valuation thereof, made under the authority of the said State or Territory, previous to the first of January, Anno Domini 1861."

No evidence was offered by defendant, on trial in the Circuit Court, to show that the records of the "last assessment and valuation of said lands, made under the authority of the State of South Carolina, was "destroyed, concealed, or lost, so as not to come within the possession of said Board of Commissioners." It is not so stated in the paper styled "Tax Certificate, No. 238." From the absence of
100 other proof, and from the absence of such statement in the paper, which purports to be a certificate of the facts of the case, the legal presumption which controls is, that the said records were *not* destroyed, lost or concealed, and *did come* within the possession of said Board. As was said by the Court in Williams vs. Kirtland, 13 Wallace, 306, "It may admit of much doubt, as also contended by counsel, whether the deed was not invalid on its face. The Act of 1862 declares that notice of sale should be given for the second Monday of January, 1863. The deed shows that the sale
101 took place on the 11th February, following, and *contains no recitals explaining the disregard of the day designated by the statute, and the selection of a different day.*"

If so, the commissioners were bound by the express terms of the statute to apportion and charge the tax upon all the lands and lots of ground situate therein, respectively, "as the said lands or lots of ground were enumerated and valued under the last assessment and valuation thereof, made under the authority of the State of South Carolina previous to the first of January, Anno Domini 1861."

102 "Tax Sale Certificate, No. 238," on its face shows that the land certified to have been "sold and struck off to the United States," at the sale of 13th March, 1863, is thus enumerated and described, "Lot B, in block 23, according to the Commissioners' plat." * *

It has been held that

"The assessments, advertisement and sale must be in the same name, whether of the real owner or not; Bettison vs Budd, 21 Ark., 278; that the title is void if the land was sold under a wrong name, under a wrong assessment.—Stansbury vs. Taggart, 3 McLean, 457." So, where the assessment roll does not contain the true name of the owner of the land, nor the name of the grantee, or if there be a misdescription of the land in the assessment and in the advertisement calculated to mislead. Yender vs. Wheeler, 9 Texas, 408." "So, where a description of the premises, as assessed and sold, was 'North and West part of S. C., 14 sect., 4 T., 4 R., 12 acres, 50, value $1,200.'—Head vs. James, 13 Wis., 641." "And in general, a sale of lands for taxes, assessed without description, circumstance or name, having any known relation to the land, is bad.—Lyman vs. Philadelphia, 56 Penn., 488." And "It is essential that the land be designated in the assessment so as to lead the owner to a knowledge of the fact that it is his land."—Dunn vs. Ralyea, 6 Wis., 475; Hilliard's Law of Taxation, p. 494. 103

The presumption of law in favor of the Commissioners, here, is that the same enumeration and description contained in their "Tax sale certificate, No. 238," was the enumeration and description contained in their advertisement and notice, and the same adopted by them in their assessment, or in the language of Section 1 in their apportioning and charging the lands of Plaintiff with the quota of the tax. 104

If this be so, then the tax was apportioned and charged upon plaintiff's land as "Lot B. in block 23, according to the Commissioners, plat," and not "as the said land or lots of grounds were enumerated and valued under the last assessment and valuation thereof, made under the authority of the State (of South Carolina) previous to the first of January, 1861." 105

Plaintiff on trial offered evidence to prove this, but the evidence was excluded. This Court will presume that the evidence, if admitted, would have shown *how* the land of plaintiff "was enumerated and valued under the last assessment and valuation made under the authority of the State of South Carolina, previous to the 1st January, 1861."

Whatever may have been the description of the land adopted by the State, or the "enumeration and valuation under the last assessment and valuation made under State authority previous to 1st January, 1861," it is certain, that at that date there was no "Commissioners' plat" in existence, and no lot in Beaufort known as "Lot B. in block 23, ac- 106

cording to the Commissioners' plat, that the assessing officers of the State of South Carolina could have known no such plat, or description, or enumeration of the lots of plaintiff,
107 and could not so have enumerated and valued them in their assessment. But it may be said, that this Court will presume in favor of the Commissioners, and of their action, that all the records of assessments and valuations of the lots of land made under the authority of the State of South Carolina previous to the 1st January, 1861, were "destroyed, concealed or lost, so as not to come within the possession of the Board of Commissioners."

It will be difficult to conceive how the Court can be induced to make such presumption against the title of the own-
108 er of the land, and in favor of the defendant, who claims under a summary proceeding, divesting such title, as the certificate contains no recital explaining the disregard of the requirement of the statute. In *French vs. Edwards, 13 Wallace, 506*, Mr. Justice Field said: "Presumptions are not indulged to sustain irregular proceedings of this character, when the irregularity is manifest. Presumptions are indulged to supply the place of that which is not apparent, not to give a new character to that which is seen to be defective. * * Every deed executed under a power must refer to the power.
109 * * But if the manner in which the power is exercised is recited, it being a proper matter for recital, then the recital is evidence, not against strangers, but against the grantee, and parties claiming under him." But let us suppose, for sake of argument, that the Court will so presume; nevertheless, we contend, that in that case, the Commissioners were only authorized by the Act of Congress "to take evidence of the same; or to value and assess the same, 'in their own judgment upon *such evidence* as may appear before them." We have shown, we think, by authority of the highest Courts in
110 the country, that if the Commissioners had acted under the authority so conferred, and taken "evidence of the same," or had valued and assessed the same in their own judgment upon such evidence *as may appear* before them, the law would have required them to preserve the evidence so taken, or which may have so appeared before them, and also their

judgment thereupon, as part of the record of their proceedings essential to their validity.

Again, we say, that the absence of proof, that the Commissioners did so proceed, and the absence of statement in "Tax sale certificate, No. 238," of the fact that they took such evidence, or that any such appeared before them, or that they, in their own judgment, valued and assessed the land, and the absence of all recital of such evidence and judgment, raises the conclusive presumption that none such was taken or appeared before them, or that they assessed and valued the land of plaintiff accordingly, and establishes the fact, upon the face of the paper, that the Commissioners did not sell the land according to the enumeration required by Act of Congress, 7th June, 1862. 111 113

There were, under the Act, but two modes of enumerating and assessing and returning the land, either according to the State enumeration and assessment previous to 1861, *or* by taking evidence of the same. In either case, the enumeration would not have been that required by the Act of Congress, (which must be assumed to be according to the general law of assessments for taxation,) if it failed to designate the land as the land of plaintiff, assessed in his name as owner, with a proper description.

If the assessment correspond with the tax certificate, then the Commissioners did not sell the land according to the enumeration required by the law of taxation, and according to Act of Congress of 7th June, 1862. Whatever course of assessment the Commissioners may have pursued, we contend, 113

5. That they had no power to make a new and different enumeration and description of the land of plaintiff, in valuing, assessing, advertising and selling the same, from that by which they had previously been enumerated and described.

This the Commissioners certainly did. It does not appear by what authority the Commissioners made a plat at all. But it will scarcely be asserted that, in making such plat and in selling by it, they had the power to change the enumeration and description of plaintiff's lots to make new and different ones from that by which they had previously been enumera- 114

ted and described. Their so-called "Tax Sale Certificate," on its face, shows, that the enumeration and description, viz.: "Lot B, in block 23, according to the Commissioners' plat."
115 by which they sold, and, it must be presumed, advertised, assessed and valued the land of plaintiff, was not and could not possibly be that by which the land had been previously enumerated and described.

6. That plaintiff was not allowed at the trial to prove that the Commissioners did not apportion and charge the tax upon the lands or lots of ground in Beaufort County, South Carolina, owned by him, as the same was enumerated and valued under the last assessment, and valuation thereof made under the authority of the said State previous to the first of
116 January, 1861.

"A tax deed, although 'sufficient' or *prima facie* evidence of the authority for the sale, description, and price, will not be admitted, if an objection that the land was not legally assessed. be sustained (*Overman vs. Parker*, 1 *Kemp* 692; *Whitney vs. Thomas*, 23 *N. Y.*, 281.)

"The validity of a tax sale depends upon the authority of the officer to sell, and upon the fairness of the transaction. It would be going too far to say that the officer selling the land with or without authority could, by his mere conveyance, transfer the title of the rightful proprietor. He must act in conformity to the law, and the purchaser is bound to inquire whether he so acted. It is therefore held to be a condition precedent to the passing of the title at such sales that *all of the proceedings of the officers who have anything to do with the listing and valuation of the land*, the levy, the col-
117 lection of the tax, the advertisement and sale of the property, the return, filing, or record of the proceeding must be in strict compliance with the statute authorizing the sale. Blackwell, p. 34. citing cases: *Early vs. Doe*, 16 *Howard*, 610; *Parker vs. Rule*, 9 *Cranch*, 64; *Weason vs. Fearson*, 9 *Howard*, 248; *Williams vs. Peyton*, 4 *Wheaton*, 97; *Thatcher vs. Powel*, 6 *Wheaton*, 119.

"The assessment is said to be in the nature of a judgment and execution against the delinquent taxpayer and constitutes the warrant of the collector to sell." *Blackford Tax Titles*, *p.* 116.

"Where the deed is made *prima facie* evidence the owner may show the failure to take any of the steps required by statute from the assessment to the deed, as in Illinois, where a judgment of condemnation and precept directing sale are required, the want of these is fatal. * * *Little vs. Herndon*, 10 *Wall*, 465; *Burroughs on Taxation*, 338.
118 Indeed it may be considered to be an established rule, that when the deed, which shows substantially the authority under which it is executed, is made *prima facie* evidence, the omitted facts in the chain of title, from the assessment to the deed, may be shown *aluinde*. Burroughs on Taxation, p. 334, citing *Budd vs. Bettison*. 17 *Ark.*, 546; *Gossett vs Kent*, 19 *Ark.*, 602; *Dukes vs. Rowley*, 24 *Ill.*, 210; *Bailey vs. Doolittle*, 24 *Ill.*, 577; *Heinman vs. Pope*, 1 *Gillman*, 131.

The Record (p. 12. folio 24,) shows that plaintiff, at the trial, offered evidence to prove that the Commissioners had not legally assessed the land, had not enumerated and valued it as the express terms of the first Section of the Act of 7th 119
June, 1862, commanded that it should be enumerated and valued, and that they did not apportion and charge the said tax upon the said lot of ground owned by the plaintiff "as the same was enumerated and valued under the last assessment and valuation thereof, made under the authority of the State of South Carolina, previous to the first day of January, 1861.

*No evidence had been offered by defendant going to show that the records of such assessment and valuation had* (within the terms of the 13th Section) been "destroyed, concealed or 120
lost, so as not to come within the possession of the said Boards of Commissioners," and there was no foundation for any presumption of fact, that they had been so destroyed, concealed or lost. On the contrary, the Court was bound to assume, (in the absence of proof to the contrary), that they had *not* been destroyed, concealed or lost, and had come into possession of the Commissioners.

His Honor, the presiding Judge, however, enquired whether plaintiff expected to prove that said records actually came within the possession of the Board of Commissioners pre- 121
vious to the making of their valuation and assessment. To this enquiry, the plaintiff replied, that he did not expect to prove that fact, and thereupon the evidence offered by the plaintiff was excluded. Did this reply of plaintiff and the fact that the plaintiff was not prepared then and there to furnish such testimony, affect plaintiff's legal right to introduce the evidence offered by him? The reply of plaintiff's Counsel was not an admission that the records had not come into the possession of the Commissioners before they made their valuation. The fact might have been that they had so come, 122
and yet plaintiff might not be able to prove it, (or he might not have prepared himself to prove it at the trial.) He was certainly not under any legal obligation to prove it. If true, that the records had come into the possession of the Commissioners before they made their valuation, the Commissioners

themselves were probably the only witnesses of the fact. Plaintiff was surely not bound to resort to them as his witnesses, or to their testimony to show that they had not
123 followed the law in the process of forfeiting his land.

If the plaintiff had been allowed to prove that the Commissioners had not assessed the tax against the plaintiff's land, as the same was enumerated and valued by the last State assessment, the defendant, if the facts were so, or he was prepared to prove that the records of said assessment had not come into the possession of the Commissioners before they made their valuation, would have had the fullest opportunity to introduce evidence on the point in reply to plaintiff, and the jury would have weighed the evidence on both sides and
124 found the fact one way or the other.

But even supposing it to be true that the records had not come into the possession of the Commissioners before they made their valuation, proof of that fact alone would not have met the requirement of the 13th Section of the Act.

Before the Commissioners could have resorted to any other mode of enumerating and valuing for assessment the lands of plaintiff, and before their assessment so made could be sustained, as in conformity with the law, proof would be required of the fact that the records of the assessment, which
125 were prescribed by the Acts to them in the first instance had been either "destroyed" or "concealed" or "lost." If they existed and came into their hands after they made their valuation, the law would surely make the Commissioners account for their not having come into their possession previously. And the purchaser, whom the law affects with notice of all defects in his title, should have been prepared with proof as to the fact and to show strict compliance with the law by the Commissioners.

The Court is bound to presume, that the proof offered by
126 plaintiff would have been sufficient to establish facts which he offered to prove. By the exclusion of the evidence, plaintiff was deprived of a right to show a defect in the proceedings of the Commissioners which might have saved his property.

7. Plaintiff was not allowed to prove that the land owned

by him was not described in the advertisement and notice of sale, as required by law, or as the lot of the plaintiff, or by its situation and boundaries, or as enumerated in the last valuation and assessment thereof, made under the authority 127
of the State previous to 1st January, 1861, or as enumerated on the old plat of the town of Beaufort, or by giving the streets and numbers thereon, by which said lots were known and recognized.

The authorities all agree, that the description of the property in the assessment, advertisement and sale, should be, must be such as that there can be no mistake as to the properrty assessed, &c.

"The title is void, if the land was sold under a wrong name, under a wrong assess- 128
ment." (Strausburg vs. Taggart, 3 McLean, 457). So, where the assessment roll does not contain a *true name of the owner of the land*, nor the name of the grantee, or if the Assessor fails to post up a copy of the tax list at the Courthouse, or if *there be a misdescription of the land in the assessment and in the advertisements calculated to mislead* (Yender vs. Wheeler, 9 Tex., 408); and in general, a sale of land for taxes assessed, *without description, circumstances* or *name having any known relation to the land is bad*. (Lyman vs. Philadelphia, 56 Penn., 488). It is essential that the land be designated in the assessment, so as to lead the owner to a knowledge of the facts that it is his land." (Dunn vs. Ralyea, 6 W. and S, 475). Ib. 494.

"An assessment is avoided by omission to assess the land to the known owner or occupant." (Milwaukie vs. Hubbard, 29 Wis., 51.)

"In Brown vs. Desmoor, (3 New Hampshire, 103,) the question was, whether in 129
listing the land for taxation, the *name of the owner* or *the description of the land* or both, should be inserted in the list. Such was the language of the Statute, that it was susceptible of either construction, and the Court held, that the insertion *of both the name and the description* was necessary. Blackwell, p. 64.

The Court must assume that the proof offered could have been established if allowed, and that the jury would have found for the plaintiff upon the facts so proved; if so the plaintiff has been denied a right at the trial, and the judgment must be set aside.

Even if the records of the last State assessment had been proved to have been destroyed, concealed or lost, and never to 130
have come into the possession of the Commissioners, still the land should have been designated as it was known in the town of Beaufort as land owned by W. J. DeTreville in that town, as lots number 104 and 388 on the old plat of Beaufort, on Prince and New streets.

In Ronkendorff vs. Taylor, Lessee, 4 Peters, 349, the advertisement purported to sell "half of Lot No. 4, in Square No. 491, assessed to James N. Taylor." The Court, by Mr.
131 Justice McLean, said: "It is not sufficient, in an advertisement of land for sale for unpaid taxes, that such a description is given as would enable the person desirous of purchasing to ascertain the situation of the property by inquiry; nor, if the purchaser at the sale had been informed of every fact necessary to enable him to fix a value upon the property, would the sale be valid, unless the same information had been *communicated to the public in the notice.*" * *

" The value of a lot or half lot depends upon its situation. If one of the half lots fronts two streets in a populous part of
132 the city, it is of much higher value than the other half, and this difference in value may be much greater if the lot be situated near the middle of the square, etc. "

8. That Beaufort during the period of advertisement and sale of this land was under martial law, and ~~now~~ the absolute authority of the commander of the Military District, that such commander on the Saturday preceding the day on which the property was to be sold, issued an order forbidding the sale, was evidence sufficient to have justified all owners of advertised lands in assuming that no sale would take
133 place. A new advertisement and notice of sale was by this order made necessary before a valid or fair sale could take place. It stands as if no advertisement or notice had been made, and therefore avoids the sale.

9. The evidence of defendant, "Cash Sale Certificate, No. 238," shows that the land in question was sold in one entire lot to the defendant, whereas the 11th Section of the Act of June 7, 1862, provided that the Board of Commissioners, under the direction of the President, "may be authorized instead of leasing the said lands vested in the United States
134 as above provided, *to cause the same, or any portion thereof, to be sub-divided and sold in parcels*, not to exceed three hundred and twenty-one acres to any one purchaser," &c.

The only power of the Commissioners for the second sale was that derived from the letter of this Section. The only power to sell was to "cause the land to be sub-divided and

sold in parcels." No sale of any lots without sub-division, certainly none of any entire lot or lots capable of being sub-divided. The land of plaintiff consisted (as proved) of two lots, known as lots Nos. 104 and 388, (Record p 10.) They 135
were sold together as one lot, viz., "Lot B." The sale was clearly excessive.

*Cooley on Taxation*, p. 342, p. 343, p. 344, note 1.

10. The authority of the Commissioners to sub-divide and sell by Section 11 of the Act, was to be under the direction of the President. These were among others, as follows:

"Prior to making such sale, you will appraise the said lots and buildings at their cash value, and, in case any of the same, on being offered for sale, shall not be bid to one-third of the appraised value, you will cause the same to be withdrawn 136
from sale, etc."

The evidence of defendant disclosed no appraisement of the lot. With such evidence, how could the jury know, or the Court now see, whether the sum bid by Robert Small, and at which the property "was sold and struck off," was one-third of the assessed value, and whether, being less than one-third, the lots should not have been withdrawn.

The instructions of the President, as to the appraisement not being shown to have been observed, the sale is void.

11. The addition of the percentage of 50 per cent. penalty 137
added, by the Act of 1862, to the quota assessed to the State of South Carolina, under the Act of 1861, is in palpable conflict with the constitution, and made the direct tax one not laid in proportion to the census, or enumeration therein directed. If the quota assessed by the Act of 1861 was not apportioned according to number, as provided in Section 2 of Article 1, of the Constitution, then the assessment and sale are absolutely void.

If the quota was properly assessed, it could not be increased against any one or more of the States and Territories without 138
making the whole tax void, *ab initio*.

This needs no argument or authority. It only requires a plain reading of the Constitution.

THEODORE G. BARKER.
*Counsel for Plaintiff in Error.*

AN ACT to provide increased revenue from imports, to pay interest on the public debt, and for other purposes.

* * * * * * *

SEC. 8. *And be it further enacted*, That a direct tax of twenty millions of dollars be and is hereby annually laid upon the United States, and the same shall be and is hereby apportioned to the States, respectively, in manner following:

To the State of South Carolina, three hundred and sixty-three thousand five hundred and seventy and two-third dollars. (Aug. 5, 1861. 12 S. L., 294.)

AN ACT for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That when in any State or Territory, or in any portion of any State or Territory, by reason of insurrection or rebellion, the civil authority of the government of the United States is obstructed so that the provisions of the act entitled "An act to provide increased revenue from imports to pay interest on the public debt, and for other purposes," approved August fifth, eighteen hundred and sixty-one, for assessing, levying, and collecting the direct taxes therein mentioned, cannot be peaceably executed, the said direct taxes, by said act apportioned among the several States and Territories respectively, shall be apportioned and charged in each State and Territory, or part thereof, wherein the civil authority is thus obstructed, upon all the lands and *lots of ground situate therein, respectively*, except such as are exempt from taxation under the laws of said State or of the United States, as the *said lands or lots of ground were enumerated and valued under the last assessment and valuation*

*States* or in the purchasers at such sale, in fee-simple, free and discharged from all prior liens, encumbrances, right, title and claim whatsoever.

SEC. 13. *And be it further enacted*, That in case the records of assessments and valuation of the lots of land mentioned in the first section of this act shall be destroyed, concealed, or lost, so as not to come within the possession of the said boards of commissioners, they shall be authorized to take evidence of the same, or to value and assess the same in their own judgment upon such evidence as may appear before them; and no mistake in the valuation of the same, or in the amount of tax thereon, shall, in any manner whatever, affect the validity of the sale of the same or of any of the proceedings preliminary thereto.

SEC. 14. *And be it further enacted*, That the said tax commissioners shall keep a book or books, in which they shall enter, or cause to be entered, the amount or quota of said direct tax assessed on each tract or parcel of land; which said amounts shall be distinctly stated in the advertisement, or notice of sale, together with a description of book, or books, of each tract sold, together with the name of the purchaser, and the sum for which the same may have been sold. A transcript or transcripts of said book or books, duly verified by said commissioners, and said books, when said commission shall expire, shall be filed in the office of the Secretary of the Treasury of the United States, and said books and transcripts, and copies of said books and transcripts duly certified by the Secretary of the Treasury, shall be evidence in any court in the United States. The said commissioners may employ a clerk, whose compensation shall be twelve hundred dollars per annum. (June 7, 1862. 12 S. L., 422.)

*thereof*, made under the authority of said State or Territory, previous to the first of January, anno Domini eighteen hundred and sixty-one; and each and every parcel of the said lands, according to said valuation, is hereby declared to be, by virtue of this act, charged with the payment of so much of the whole tax laid and apportioned by said act upon the State or Territory wherein the same is respectively situate, as shall bear the same direct proportion to the whole amount of the direct tax apportioned to said State or Territory as the value of said parcels of land shall respectively bear to the whole valuation of the real estate in said State or Territory, according to the said assessment and valuation made under the authority of the same; and in addition thereto a penalty of fifty per centum of said tax shall be charged thereon.

SEC. 2. *And be it further enacted*, That on or before the first day of July next, the President, by his proclamation, shall declare in what States and parts of States said insurrection exists, and thereupon the said several lots or parcels of land shall become charged respectively with their respective portions of said direct tax, and the same together with the penalty shall be a lien thereon, without any other or further proceeding whatever.

SEC. 3. *And be it further enacted*, That it shall be lawful for the owner or owners of said lots or parcels of lands, within sixty days after the tax commissioners herein named shall have fixed the amount, to pay the tax thus charged upon the same, respectively, into the treasury of the United States, or to the commissioners herein appointed, and take a certificate thereof, by virtue whereof the said lands shall be discharged from said tax.

SEC. 4. *And be it further enacted*, That the title of, in, and to each and every piece or parcel of land upon which said tax has not been paid as above provided, shall thereupon become *forfeited* to the United States, and, upon the sale hereinafter provided for, *shall vest in the United*

AN ACT to amend an act entited "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," approved June 7, eighteen hundred and sixty-two.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the seventh section of an act entitled "An ac for the collection of direct taxes in insurrectionary districts within the United States," approved June seven, eighteen hundred and sixty-two, and for other purposes, be amended so as to read as follows:

SEC. 7. *And be it further enacted*, That the said board of commissioners shall be required, in case the taxes charged upon the said lots and parcels of land shall not be paid, as provided for in the third section of this act, to cause the same to be advertised for sale in a newspaper published in the town, parish, district, or county where situate; and if there be no such newspaper published in said town, parish, district, or county, or if the publisher thereof refuse to publish the same, then in any other newspaper to be selected by said commissioners in said district, or in the city of Washington, for at least four weeks, and by posting notices of said sale in three public places in the town, parish, district, or county within which said lands are situate, at least four weeks previous to the day of sale; and at the time and place of sale to cause the same to be severally sold to the highest bidder for a sum not less than the taxes, penalty, and costs, and ten per centum per annum interest on said tax, pursuant to said notice; in all cases where the owner of said lots or parcels of ground shall not, on or before the day of sale, appear in person before the said board of commissioners and pay the amount of said tax, with ten per centum interest thereon, with the cost of advertising the same, or request the same to be struck off to a purchaser for a less sum than two-thirds of the assessed value of said several lots or parcels of ground,

the said commissioners shall be authorized at said sale to bid off the same for the United States at a sum not exceeding two-thirds of the assessed value thereof, unless some person shall bid a larger sum; and in that case the same shall be *struck off to the highest bidder, who shall, upon paying the purchase-money in gold and silver coin, or in the treasury notes of the United States, or in United States notes, or in certificates of indebtedness against the United States, be entitled to receive from said commissioners their certificate of sale; which said certificate shall be received in all courts and places as prima facie evidence of the regularity and validity of said sale, and of the title of said purchaser or purchasers under the same; And provided further,* That at such sale any tracts, parcels, or lots of land which may be selected under the direction of the President for government use, for war, military, naval, revenue, charitable, educational, or police purposes, may, at said sale, be bid in by said commissioners under the direction of the President, for, and struck off to the United States: *And provided further, That the certificate of said commissioners shall only be affected as evidence of the regularity and validity of sale by establishing the fact that said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of this act.*

Approved, February 6, 1863. (12 S. L., 640.)

# In the Court of Claims of the United States.

OCTOBER TERM, 1878.

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W. F. DE TREVILLE, PLAINTIFF IN ERROR,
*vs.*
ROBERT SMALLS, DEFENDANT IN ERROR. } No. 102.

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## BRIEF FOR THE UNITED STATES.

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The statement by the plaintiff in error, inadvertently perhaps, mentions the *value* of the land in controversy, and also refers to the *cash-sale land-certificate.* If any evidence was given at the trial as to the value of the land, it has escaped me upon the record, and in any event is immaterial. So, although it appears upon the record that the counsel below agreed that certain papers might be used in evidence, and copies thereof are given in such connection, yet the bill of exceptions does not state that the *cash-sale land-certificate* was actually so used, and does not contain it; there being in a court of law no other way of placing evidence upon the record for review in error. I submit, therefore, that neither of the above matters is now before the court; and that the bill of exceptions is to be considered merely in connection with the exceptions taken below.

The bill of exceptions is to be found upon the record,

beginning with folio 20, and is so compact as not to justify abbreviation.

1. As to the objections to the competency of the tax-sale certificate (Record, folio 22, &c.), I submit that in the main they are answered by the authority of Cooley *vs.* O'Connor, 12 Wallace, 291, which solemnly decides that such a certificate is to be issued as well where the land is *bid off for the United States* as where a private person becomes the purchaser. As a corollary to such decision it follows by the words of the act of 1862, section 7, that the paper set forth in the bill of exceptions, if it be a tax-sale certificate, is, *per se*, "*prima facie evidence of the regularity and validity of said sale, and of the title of the United States under the same.*" It is such evidence not because of any preamble or recitals, but because of its nature and operation. The *simplest* certificate of a sale for taxes under the act of 1862 is as complete evidence of title, &c., as the *longest drawn*. Whatever action is required by the statute to perfect such title, whether such action be ordinary or exceptional, is *prima facie* proved by the certificate of sale in which it results. (Blackwell on Tax Titles, *89; Turney *vs.* Yeoman, 14 Ohio, 207; Bettison *vs.* Budd, 17 Ark., 556.)

2. As for the exclusion of the evidence offered by the plaintiff to prove that the commissioners did not apportion and charge the said tax upon the lot *as the same was enumerated and valued by the State previously to January* 1, 1861, it seems that his admission, in reply to a question put by the court, *that he did not expect to prove that the records of assessment and valuation of the lot by the State came into the possession of the commissioners previous*

*to the making of their valuation and assessment*, justified such exclusion. For, notwithstanding what is urged in the plaintiff's brief—*de non apparentibus et non existentibus eadem est ratio—i. e.*, it is shown by the record that such papers did not so come into their possession; and the history of the times plainly indicates why—the whole matter being equivalent to *a not coming into their possession because of destruction, concealment, or loss.*

The enumerations, &c., under State authority, previous to 1861, were of course in the hands of the rebel State government, and, therefore, if they did not in fact come into the hands of the commissioners, must be assumed not to have done so because virtually *concealed* at the instance of the plaintiff in error, who lived under, and, so, co-operated with such government.

3. If the assessments, &c., previously to 1861 were concealed, there was no reason or requirement for following in the advertisements their description of the lots to be sold. Nor, presumably, was any information as to *ownership* of such lots possessed by the commissioners. It was enough for them to find land liable to the tax, and to give a reasonable description thereof. That the description given ("lot B in block 23") was reasonable will be presumed, and is also suggested by the fact that certain lots adjoining had long been known as "lot A of block 23." (See 12 Wallace, 391, and the plaintiff's declaration, folio 5.) The new description was given because of divisions and plats openly made by public authority, and if unknown to the plaintiff in error was so because of *his own wrong.*

4. I submit that the evidence tendered in regard to the action of General Hunter was upon its face *immaterial.*

5. It seems rather late in the day to question the constitutionality of the act of 1862. It has been before the court *four* times, at and since December term, 1869, without being questioned by either court or counsel. (See 9 Wall., 326; 10 Wall., 464; 12 Wall., 391; and 14 Wall., 553.) However, allowing that such questioning is competent, it seems that in point of fact there is no place for objection. For, although section *one* imposes a tax and also a penalty, yet the later sections show that the penalty was not to be exacted until *after, and because of, a failure to pay such tax.* Section 3 requires the owner to pay *the tax charged*, and no more. That this did not include the penalty appears by comparing its wording with that of sections 1, 2, 7, and 8.

If this were otherwise, considering that the constitutional rule for the imposition of direct taxes is based *substantially* upon the proportion of representation in the lower house of Congress (both taxation and representation being referred to the census as their common standard), it might be a curious theme for inquiry whether the State of South Carolina in 1862 could, *flagrante bello*, have sent representatives to the Congress of the United States; and, if not, whether the powers of the United States, as sovereign no less than as a party to a war, were at all limited in regard to taxation by the rule suggested. The tax (see title of the act) in question may have been rather *a levy of contribution* from an "insurrectionary district" than a "direct tax," as known in time of ordinary peace.

I have conformed this brief to the enumerations of exceptions upon the face of the bill of exceptions. I am not sure that the learned counsel for the plaintiff in error

has intended in his brief to add to the exceptions taken upon the trial. The points now made by him are more numerous than those upon the record, but as none of such points, except the last, arise upon the record proper, I submit that so far as such points go beyond the exceptions they cannot be considered.

S. F. PHILLIPS,
*Solicitor-General.*